

16C C.J.S. Constitutional Law VIII XIX Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

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Research References

A.L.R. Library


A.L.R. Index, Constitutional Law

A.L.R. Index, Due Process

A.L.R. Index, Fifth Amendment

A.L.R. Index, Fourteenth Amendment

A.L.R. Index, State Action

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16C C.J.S. Constitutional Law VIII XIX A Refs.

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

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A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Due Process

West's A.L.R. Digest, [Constitutional Law](#) 🔑 [3840](#) to [3842](#), [3846](#), [3866](#), [3867](#), [3893](#) to [3900](#)

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16C C.J.S. Constitutional Law § 1812

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1812. Definitions and characterization of "due process," generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑3840

Due process of law is not susceptible, or does not admit, of exact, precise, comprehensive, or concrete definition, its meaning necessarily varying in accordance with the dissimilarity in the multitude of proceedings in which it is required.

"Due process of law" is not a term of fixed and invariable content,¹ nor are due process protections final and fixed.²

Due process is a flexible concept which depends upon the circumstances and a balancing of various factors;³ its protections emerge from cases reconciling needs both of continuity and of change in a progressive society⁴ and as the particular situation demands.⁵ While the exact boundaries of the concept of due process are undefinable, its content varies according to specific factual contexts.⁶ Neither the federal nor state constitutions have made any attempt to define what is "due process of law" or its equivalent⁷ nor have the cases successfully attempted an exact and comprehensive definition applicable to all possible cases and circumstances.⁸

Due process of law is not susceptible, or does not admit, of exact, precise, comprehensive, or concrete definition,⁹ its meaning necessarily varying with the dissimilarity in the proceedings in which it is required.¹⁰

Attempts at an inclusive definition are as general as the term "due process of law" itself and only slightly more helpful in applying them to any particular case.¹¹ One attempt defines the term "due process of law" as the general rules which govern society.¹²

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Footnotes

- 1 U.S.—*Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).
Md.—*Blue Cross of Maryland, Inc. v. Franklin Square Hospital*, 277 Md. 93, 352 A.2d 798 (1976).
N.J.—*Wakefield v. Pinchak*, 289 N.J. Super. 566, 674 A.2d 621 (App. Div. 1996).
- 2 U.S.—*Caballero v. Caplinger*, 914 F. Supp. 1374 (E.D. La. 1996).
- 3 § 1867.
- 4 U.S.—*Caballero v. Caplinger*, 914 F. Supp. 1374 (E.D. La. 1996).
- 5 N.J.—*Wakefield v. Pinchak*, 289 N.J. Super. 566, 674 A.2d 621 (App. Div. 1996).
- 6 U.S.—*Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990).
- 7 Minn.—*In re Enger's Will*, 225 Minn. 229, 30 N.W.2d 694, 1 A.L.R.2d 1048 (1948).
Miss.—*Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938).
- 8 Me.—*In re Thompson*, 116 Me. 473, 102 A. 303 (1917).
- 9 Mont.—*In re A.F.-C.*, 2001 MT 283, 307 Mont. 358, 37 P.3d 724 (2001).
Neb.—*In re Brian B.*, 268 Neb. 870, 689 N.W.2d 184 (2004).
Pa.—*Reading School Dist. v. Dept. of Educ.*, 875 A.2d 1218, 199 Ed. Law Rep. 337 (Pa. Commw. Ct. 2005).
- 10 N.Y.—*Traiger v. Sacks*, 184 Misc. 955, 54 N.Y.S.2d 917 (Mun. Ct. 1945), order *aff'd*, 185 Misc. 540, 60 N.Y.S.2d 926 (App. Term 1945).
- 11 N.Y.—*Roseman v. Fidelity & Deposit Co. of Maryland*, 154 Misc. 320, 277 N.Y.S. 471 (N.Y. City Ct. 1935).
- 12 U.S.—*Owens v. Battenfield*, 33 F.2d 753 (C.C.A. 8th Cir. 1929).
Mo.—*State v. Broadus*, 315 Mo. 1279, 289 S.W. 792 (1926).

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16C C.J.S. Constitutional Law § 1813

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1813. Fair play, justice, and decency

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3841, 3866

Due process is the embodiment of fair play, justice, and decency.

Due process is the embodiment of fair play,¹ justice,² and decency.³

Due process requires that the State's actions be consistent with the fundamental principles of liberty and justice which lie at the base of all American civil and political institutions.⁴

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Footnotes

- ¹ N.M.—[Pierce v. State](#), 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288 (1995).
Tex.—[Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.](#), 997 S.W.2d 298 (Tex. App. Austin 1999).
Wash.—[State v. Hotrum](#), 120 Wash. App. 681, 87 P.3d 766 (Div. 3 2004).
Embodiment of English sporting idea of fair play
Mich.—[Dodge v. Detroit Trust Co.](#), 300 Mich. 575, 2 N.W.2d 509 (1942).
Purpose

The purpose of due process is only to ensure abstract fair play to the individual.

N.Y.—[Mark N. v. Runaway Homeless Youth Shelter](#), 189 Misc. 2d 245, 733 N.Y.S.2d 566 (Fam. Ct. 2001).

2 N.M.—[Pierce v. State](#), 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288 (1995).

Tex.—[Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.](#), 997 S.W.2d 298 (Tex. App. Austin 1999).

Substantial justice

N.Y.—[Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.](#), 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dep't 1986).

Principles of justice

"Due process of law" implies conformity with natural and inherent principles of justice.

Ohio—[City of Dayton v. Keys](#), 21 Ohio Misc. 105, 50 Ohio Op. 2d 29, 50 Ohio Op. 2d 228, 252 N.E.2d 655 (C.P. 1969).

3 La.—[Maumus v. Dept. of Police, New Orleans](#), 457 So. 2d 37 (La. Ct. App. 4th Cir. 1984), writ denied, 461 So. 2d 1054 (La. 1985).

N.H.—[Saviano v. Director, N.H. Div. of Motor Vehicles](#), 151 N.H. 315, 855 A.2d 1278 (2004).

Wash.—[State v. Hotrum](#), 120 Wash. App. 681, 87 P.3d 766 (Div. 3 2004).

4 U.S.—[DuBose v. Kelly](#), 187 F.3d 999 (8th Cir. 1999).

N.H.—[State v. Damiano](#), 124 N.H. 742, 474 A.2d 1045 (1984).

Wash.—[State v. Hotrum](#), 120 Wash. App. 681, 87 P.3d 766 (Div. 3 2004).

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16C C.J.S. Constitutional Law § 1814

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1814. Fundamental fairness

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3866

Due process means fundamental fairness.

Due process means¹ or concerns² fundamental fairness and expresses the requirement or requirements thereof.³ Fundamental fairness is the essence,⁴ or touchstone,⁵ of due process. The principle of fairness underlies the right to due process⁶ and is an element⁷ and integral part⁸ thereof. In other words, due process embodies the notion of fundamental fairness,⁹ that derives ultimately from the natural rights of all individuals.¹⁰ Due process has also been defined as the observance of that fundamental fairness which is essential to the very concept of justice,¹¹ resting on basic fairness of procedure and demanding a procedure appropriate to the case and just to the parties involved.¹²

The ultimate standard for judging a due process claim is the notion of fundamental fairness;¹³ fundamental fairness requires that government conduct conform to the community's sense of justice, decency, and fair play.¹⁴ The court's role is not to define due process according to its personal and private notions of fairness.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

The Due Process Clause centrally concerns the fundamental fairness of governmental activity. [U.S. Const. Amend. 14](#). [North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust](#), 139 S. Ct. 2213 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Pedersen v. South Williamsport Area School Dist.](#), 677 F.2d 312, 4 Ed. Law Rep. 369 (3d Cir. 1982).
W. Va.—[Nichols v. State](#), 213 W. Va. 586, 584 S.E.2d 220 (2003).
- 2 Kan.—[In re Appeals of Various Applicants from a Decision of Division of Property Valuation of State for Tax Year 2009 Pursuant to K.S.A. 74-2438](#), 298 Kan. 439, 313 P.3d 789 (2013), cert. denied, 135 S. Ct. 51, 190 L. Ed. 2d 29 (2014).
Wis.—[Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce](#), 227 Wis. 2d 650, 597 N.W.2d 721 (1999).
- 3 Mont.—[In re A.F.-C.](#), 2001 MT 283, 307 Mont. 358, 37 P.3d 724 (2001).
- 4 Conn.—[In re Dodson](#), 214 Conn. 344, 572 A.2d 328 (1990) (rejected on other grounds by, [Hardy v. Superior Court](#), Judicial Dist. of Fairfield, 305 Conn. 824, 48 A.3d 50 (2012)).
- 5 Colo.—[Public Service Co. of Colorado v. Public Utilities Com'n of State of Colo.](#), 765 P.2d 1015 (Colo. 1988).
Ga.—[Meadows v. Settles](#), 274 Ga. 858, 561 S.E.2d 105 (2002).
- 6 Mich.—[Building Owners and Managers Ass'n of Metropolitan Detroit v. Public Service Com'n](#), 131 Mich. App. 504, 346 N.W.2d 581 (1984), judgment aff'd, 424 Mich. 494, 383 N.W.2d 72 (1986).
- 7 Tenn.—[State v. Merriman](#), 410 S.W.3d 779 (Tenn. 2013).
- 8 N.J.—[State v. Miller](#), 216 N.J. 40, 76 A.3d 1250 (2013), cert. denied, 134 S. Ct. 1329, 188 L. Ed. 2d 339 (2014).
- 9 Fla.—[Scully v. State](#), 569 So. 2d 1251 (Fla. 1990).
Neb.—[In re Brian B.](#), 268 Neb. 870, 689 N.W.2d 184 (2004).
Tenn.—[Howell v. State](#), 151 S.W.3d 450 (Tenn. 2004).
- 10 Fla.—[Scully v. State](#), 569 So. 2d 1251 (Fla. 1990).
- 11 U.S.—[Goddard v. Frazier](#), 156 F.2d 938 (C.C.A. 10th Cir. 1946).
N.Y.—[Bagley v. Bagley](#), 57 Misc. 2d 388, 292 N.Y.S.2d 796 (Sup 1968).
- 12 Utah—[In re Worthen](#), 926 P.2d 853 (Utah 1996).
- 13 N.H.—[Doe v. State](#), 111 A.3d 1077 (N.H. 2015).
- 14 N.H.—[Saviano v. Director, N.H. Div. of Motor Vehicles](#), 151 N.H. 315, 855 A.2d 1278 (2004).
- 15 Wash.—[State v. Hotrum](#), 120 Wash. App. 681, 87 P.3d 766 (Div. 3 2004).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1815. Particular definitions of "due process" and equivalent terms

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3840

The phrase "due process of law" is the summarized constitutional guaranty of respect for those personal immunities that are so rooted in the traditions and conscience of the American people as to be ranked as fundamental or are implicit in the concept of ordered liberty.

The phrase "due process of law" is the summarized constitutional guaranty of respect for those personal immunities that are so rooted in the traditions and conscience of the American people as to be ranked as fundamental or are implicit in the concept of ordered liberty.¹ Due process of law is an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.² According to another definition, due process of law is that process of impartial law that is binding because it is right; it senses the mistakes of the past and wants to rectify them; and it provides people with faith.³

A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process of law.⁴

By "due process" is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.⁵

Other terms equivalent to due process of law are "due course of law,"⁶ "due course of the law of the land,"⁷ and "course of the common law."⁸

CUMULATIVE SUPPLEMENT

Cases:

Language in New Jersey Constitution, providing that every person possesses unalienable rights to enjoy life, liberty, and property and to pursue happiness, is construed as fundamental guarantee of due process. [N.J. Const. art. 1, par. 1. S.C. v. New Jersey Department of Children and Families](#), 242 N.J. 201, 231 A.3d 576 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Rochin v. California](#), 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952); [Madden v. City of Meriden](#), 602 F. Supp. 1160 (D. Conn. 1985).
N.M.—[State v. Druktenis](#), 135 N.M. 223, 2004-NMCA-032, 86 P.3d 1050 (Ct. App. 2004).
- 2 Ohio—[In re Schott](#), 16 Ohio App. 2d 72, 45 Ohio Op. 2d 168, 241 N.E.2d 773 (1st Dist. Hamilton County 1968).
Utah—[State v. Young](#), 853 P.2d 327 (Utah 1993).
- 3 U.S.—[U.S. ex rel. Montgomery v. Ragen](#), 86 F. Supp. 382 (N.D. Ill. 1949).
- 4 Ariz.—[State v. Gee](#), 73 Ariz. 47, 236 P.2d 1029 (1951).
- 5 U.S.—[Hagar v. Reclamation Dist. No. 108](#), 111 U.S. 701, 4 S. Ct. 663, 28 L. Ed. 569 (1884).
Del.—[Riley v. Banks](#), 44 Del. 489, 62 A.2d 229 (Super. Ct. 1948).
- 6 U.S.—[Walsh v. Erie County Dept. of Job and Family Services](#), 240 F. Supp. 2d 731 (N.D. Ohio 2003).
Ind.—[Gingerich v. State](#), 979 N.E.2d 694 (Ind. Ct. App. 2012), transfer denied, 984 N.E.2d 221 (Ind. 2013).
Ohio—[State v. White](#), 2013-Ohio-51, 988 N.E.2d 595 (Ohio Ct. App. 6th Dist. Lucas County 2013), appeal allowed, 135 Ohio St. 3d 1447, 2013-Ohio-2062, 987 N.E.2d 703 (2013).
Tex.—[Dardeau v. West Orange-Grove Consolidated Independent School Dist.](#), 43 F. Supp. 2d 722 (E.D. Tex. 1999).
- 7 Tex.—[Tarrant Appraisal Dist. v. Gateway Center Associates, Ltd.](#), 34 S.W.3d 712 (Tex. App. Fort Worth 2000).
Wash.—[Washington Local Lodge No. 104 of Intern. Broth. of Boilermakers, Iron Ship Builders & Helpers of America v. International Broth. of Boilermakers, Iron Ship Builders & Helpers of America](#), 33 Wash. 2d 1, 203 P.2d 1019 (1949).
- 8 Wash.—[Washington Local Lodge No. 104 of Intern. Broth. of Boilermakers, Iron Ship Builders & Helpers of America v. International Broth. of Boilermakers, Iron Ship Builders & Helpers of America](#), 33 Wash. 2d 1, 203 P.2d 1019 (1949).

16C C.J.S. Constitutional Law § 1816

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1816. Particular definitions of "due process" and equivalent terms—Law of the land

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West's Key Number Digest

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"Due process of law" is synonymous or interchangeable with, or equivalent to, "law of the land," a phrase appearing in many of state constitutions.

"Due process of law" is synonymous or interchangeable with, or equivalent to, "law of the land," a phrase appearing in many of state constitutions.¹ The phrases "law of the land" within the meaning of a state constitution and "due process of law" as used in the Fourteenth Amendment to the Federal Constitution are legal equivalents.²

"Law of the land" implies a general public law, equally binding on every member of the community,³ and it includes established principles of procedure and equity.⁴

Courts have sometimes made use of expressions which would indicate a view that the term "the law of the land," as used in the state constitutions, refer to some particular body of laws then in existence;⁵ but its meaning cannot be so limited, for that would deny any power in a legislature to amend or repeal old laws or to enact new ones.⁶

Footnotes

- 1 N.H.—*Bragg v. Director, New Hampshire Div. of Motor Vehicles*, 141 N.H. 677, 690 A.2d 571 (1997).
N.C.—*Patmore v. Town of Chapel Hill North Carolina*, 757 S.E.2d 302 (N.C. Ct. App. 2014), review denied, 367 N.C. 519, 758 S.E.2d 874 (2014).
Pa.—*Com. v. Rose*, 2013 PA Super 305, 81 A.3d 123 (2013), appeal granted, 95 A.3d 274 (Pa. 2014).
Same protection
Tenn.—*CitiMortgage, Inc. v. Drake*, 410 S.W.3d 797 (Tenn. Ct. App. 2013), appeal denied, (Aug. 14, 2013).
- 2 Me.—*State v. Demeritt*, 149 Me. 380, 103 A.2d 106 (1953).
Pa.—*Com. v. CSX Transp., Inc.*, 653 A.2d 1327 (Pa. Commw. Ct. 1995).
- 3 Tex.—*Ex parte Sizemore*, 110 Tex. Crim. 232, 8 S.W.2d 134, 59 A.L.R. 430 (1928).
- 4 U.S.—*Owens v. Battenfield*, 33 F.2d 753 (C.C.A. 8th Cir. 1929).
- 5 Wash.—*Washington Local Lodge No. 104 of Intern. Broth. of Boilermakers, Iron Ship Builders & Helpers of America v. International Broth. of Boilermakers, Iron Ship Builders & Helpers of America*, 33 Wash. 2d 1, 203 P.2d 1019 (1949).
- 6 Mo.—*De May v. Liberty Foundry Co.*, 327 Mo. 495, 37 S.W.2d 640 (1931).
Nev.—*Vineyard Land & Stock Co. v. District Court of Fourth Judicial Dist. of Nevada in and for Elko County*, 42 Nev. 1, 171 P. 166 (1918).
Wash.—*Washington Local Lodge No. 104 of Intern. Broth. of Boilermakers, Iron Ship Builders & Helpers of America v. International Broth. of Boilermakers, Iron Ship Builders & Helpers of America*, 33 Wash. 2d 1, 203 P.2d 1019 (1949).

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16C C.J.S. Constitutional Law § 1817

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1817. Definitions and characterization of "due process" as applied to judicial proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑3867

As applied to judicial proceedings, due process of law may be defined to mean a law that hears before it condemns, that proceeds on inquiry, and renders judgment only after trial.

Whatever difficulty may be experienced in giving to the term "due process of law" a definition that will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of its meaning when applied to judicial proceedings.¹ As so applied, due process of law has been variously defined to mean a law that hears before it condemns, that proceeds on inquiry, and that renders judgment only after trial;² ordinary judicial process or proceedings in court;³ the right to be heard before some tribunal having jurisdiction to determine the question in dispute;⁴ the right to know how the proceedings shall be conducted, in addition to knowing when the proceedings shall be conducted;⁵ and that a party shall have his or her day in court.⁶ Due process does not require any particular form or procedure; it requires only that a party receive proper notice of proceedings and an opportunity to present his or her position before a competent tribunal.⁷

Due process in judicial proceedings, may be characterized as the law in its regular course of administration through courts of justice;⁸ or the law in its regular course of administration, according to prescribed forms, and in accordance with general rules

for protection of individual rights.⁹ According to other definitions, due process means a jury capable and willing to decide the case solely on the evidence before it,¹⁰ and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.¹¹

CUMULATIVE SUPPLEMENT

Cases:

The right to be heard in a court of law in response to proceedings seeking to deprive one of one's own property is a fundamental requirement of due process. [U.S. Const. Amend. 14](#). [T.H. McElvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc.](#), 2017-NMSC-004, 388 P.3d 240 (N.M. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 Tenn.—[Tennessee Cent. Ry. Co. v. Pharr](#), 183 Tenn. 658, 194 S.W.2d 486 (1946).
Utah—[Christiansen v. Harris](#), 109 Utah 1, 163 P.2d 314 (1945).
- 2 U.S.—[Truax v. Corrigan](#), 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
Alaska—[Weiss v. State](#), 939 P.2d 380 (Alaska 1997).
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Utah—[Pangea Technologies, Inc. v. Internet Promotions, Inc.](#), 2004 UT 40, 94 P.3d 257 (Utah 2004).
- 3 U.S.—[Marshall v. Lauriault](#), 372 F.3d 175 (3d Cir. 2004).
Iowa—[Thomas v. State](#), 241 Iowa 1072, 44 N.W.2d 410 (1950).
- 4 Neb.—[Albin v. Consolidated School Dist. No. 14 of Richardson County](#), 106 Neb. 719, 184 N.W. 141 (1921).
- 5 Pa.—[Com., Dept. of Health v. Brownsville Golden Age Nursing Home, Inc.](#), 103 Pa. Commw. 449, 520 A.2d 926 (1987).
- 6 Ariz.—[Marco v. Superior Court](#), 17 Ariz. App. 210, 496 P.2d 636 (Div. 2 1972).
Ga.—[Thomas v. Johnson](#), 329 Ga. App. 601, 765 S.E.2d 748 (2014).
Ill.—[BAC Home Loans Servicing, LP v. Mitchell](#), 2014 IL 116311, 379 Ill. Dec. 85, 6 N.E.3d 162 (Ill. 2014).
La.—[Julia v. Waddle](#), 106 So. 3d 1229 (La. Ct. App. 5th Cir. 2012).
Mo.—[State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Com'n of Missouri](#), 330 Mo. 729, 51 S.W.2d 73 (1932).
Tex.—[McNeil Interests, Inc. v. Quisenberry](#), 407 S.W.3d 381 (Tex. App. Houston 14th Dist. 2013).
As to procedural due process, generally, see § 1822.
- 7 Wash.—[Rivers v. Washington State Conference of Mason Contractors](#), 145 Wash. 2d 674, 41 P.3d 1175 (2002).
- 8 Iowa—[Thomas v. State](#), 241 Iowa 1072, 44 N.W.2d 410 (1950).
Pa.—[Fiore v. Com., Bd. of Finance and Revenue](#), 534 Pa. 511, 633 A.2d 1111 (1993).
- 9 U.S.—[Hurtado v. People of State of Cal.](#), 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884).
Kan.—[Bailey v. Hudspeth](#), 164 Kan. 600, 191 P.2d 894 (1948).
N.Y.—[Traiger v. Sacks](#), 184 Misc. 955, 54 N.Y.S.2d 917 (Mun. Ct. 1945), order *aff'd*, 185 Misc. 540, 60 N.Y.S.2d 926 (App. Term 1945).
- 10 U.S.—[U.S. v. Olano](#), 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); [U.S. v. Torres-Chavez](#), 744 F.3d 988, 93 Fed. R. Evid. Serv. 1102 (7th Cir. 2014).
Ga.—[Bell v. State](#), 311 Ga. App. 289, 715 S.E.2d 684 (2011).
Cal.—[In re Boyette](#), 56 Cal. 4th 866, 157 Cal. Rptr. 3d 163, 301 P.3d 530 (2013).
Ill.—[People v. Sharp](#), 2015 IL App (1st) 130438, 389 Ill. Dec. 370, 26 N.E.3d 460 (App. Ct. 1st Dist. 2015).

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Ohio—[State v. Lang](#), 129 Ohio St. 3d 512, 2011-Ohio-4215, 954 N.E.2d 596 (2011).

U.S.—[U.S. v. Olano](#), 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); [U.S. v. Haynes](#), 729 F.3d 178, 92 Fed. R. Evid. Serv. 405 (2d Cir. 2013).

Colo.—[People v. Bondurant](#), 2012 COA 50, 296 P.3d 200 (Colo. App. 2012), cert. denied, 2013 WL 120466 (Colo. 2013).

Ga.—[Bell v. State](#), 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Ill.—[People v. Sharp](#), 2015 IL App (1st) 130438, 389 Ill. Dec. 370, 26 N.E.3d 460 (App. Ct. 1st Dist. 2015).

N.J.—[State v. McGuire](#), 419 N.J. Super. 88, 16 A.3d 411 (App. Div. 2011).

Ohio—[State v. Lang](#), 129 Ohio St. 3d 512, 2011-Ohio-4215, 954 N.E.2d 596 (2011).

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16C C.J.S. Constitutional Law § 1818

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1818. Definitions and characterization of "due process" as applied to judicial proceedings—Established or settled usage or rules

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3846

"Due process of law" means, among other things, process according to established usage; a method of procedure having the sanction of settled usage; or a process of law that can show the sanction of settled usage both in England and in the United States.

"Due process of law" means, among other things, process according to established usage;¹ a method of procedure having the sanction of settled usage;² or a process of law that can show the sanction of settled usage both in England and in the United States.³

The term "due process of law" has also been defined as a trial or proceedings according to the course and usage of the common law.⁴ This latter definition, however, is too limited, as due process may consist of process prescribed by statute and unknown to the common law.⁵ Due process in judicial proceedings may be characterized as any legal procedure enforced by public authority, whether sanctioned by age or custom, or newly devised in discretion of legislative power, in furtherance of general public good, which regards and preserves these principles of liberty and justice.⁶ It has also been defined as a course of legal proceedings according to those rules and principles which have been established in the system of jurisprudence for the conduct

and enforcement of private rights, such that no person is deprived of life, liberty, property, or of any right granted him or her by statute unless the matter involved has first been adjudicated against him or her upon trial conducted according to established rules regulating judicial proceedings.⁷

Whatever else may be uncertain about the definition of the term due process of law, all authorities agree that it inhibits the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.⁸

"Due process of law" is the administration of general laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the subject matter, and proceeding upon notice and hearing.⁹ "Due process of law" means a course of legal proceedings according to those rules and principles which have been established in the American system of jurisprudence for the protection and enforcement of private rights;¹⁰ securing to every person a judicial trial before he or she can be deprived of life, liberty, or property.¹¹ Due process is process that protects against the exercise of arbitrary governmental power and guarantees equal and impartial dispensation of law according to the settled course of judicial proceedings or in accordance with the fundamental principles of distributive justice.¹²

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Footnotes

- 1 Mo.—*McManus v. Burrows*, 280 Mo. 327, 217 S.W. 512 (1919).
- 2 N.Y.—*People v. Hartnett*, 124 Misc. 418, 208 N.Y.S. 246 (County Ct. 1925).
- 3 U.S.—*Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).
- 4 Md.—*Lodowski v. State*, 307 Md. 233, 513 A.2d 299 (1986).
- 5 Mo.—*State ex rel. Hurwitz v. North*, 304 Mo. 607, 264 S.W. 678 (1924), *aff'd*, 271 U.S. 40, 46 S. Ct. 384, 70 L. Ed. 818 (1926).
- 6 Ky.—*Willis v. Lafayette-Phoenix Garage Co.*, 202 Ky. 554, 260 S.W. 364 (1924).
Or.—*MacVeagh v. Multnomah County*, 126 Or. 417, 270 P. 502 (1928).
- 7 La.—*Caldwell ex rel. State v. Janssen Pharmaceutical, Inc.*, 100 So. 3d 865 (La. Ct. App. 3d Cir. 2012), writ granted, 107 So. 3d 620 (La. 2013) and judgment *rev'd* on other grounds, 144 So. 3d 898 (La. 2014).
- 8 U.S.—*Florida Pawnbrokers and Secondhand Dealers Ass'n, Inc. v. City of Fort Lauderdale*, 699 F. Supp. 888 (S.D. Fla. 1988).
Pa.—*First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau*, 104 Pa. Commw. 135, 521 A.2d 114 (1987).
As to procedural due process, generally, see § 1822.
- 9 Ga.—*In Interest of D.A.P.*, 234 Ga. App. 257, 506 S.E.2d 438 (1998).
- 10 U.S.—*Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).
Fla.—*Shappell v. Guardianship of Naybar*, 876 So. 2d 690 (Fla. 2d DCA 2004).
Minn.—*Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12 (Minn. 2004).
- 11 W. Va.—*State v. Barnhart*, 211 W. Va. 155, 563 S.E.2d 820 (2002).
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16C C.J.S. Constitutional Law § 1819

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

A. Definitions and Characterization

§ 1819. Definitions and characterization of "due process" as applied to legislation

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3893 to 3900

Due process of law, as applied to legislative enactments, means only that statutes must be general in operation and affect the rights of all who should properly be brought within their provisions, and not a special act of the legislature, passed to affect the rights of an individual against his or her will and in a way in which the same rights of other persons are not affected by existing laws.

Due process of law, as applied to legislative enactments, means only that statutes must be general in operation and affect the rights of all who should properly be brought within their provisions,¹ and not a special act of the legislature, passed to affect the rights of an individual against his or her will, and in a way in which the same rights of other persons are not affected by existing laws.² Due process of law and law of the land mean the general and public law operating equally on all persons in like circumstances, and not a partial or private law affecting the rights of a particular individual or class of individuals, in a way in which the same rights of other persons are not affected.³

"Due process of law," or "the law of the land," does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power;⁴ but it has been held that, within its constitutional authority, legislative action is due process.⁵

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Footnotes

- 1 Ariz.—[Valley Nat. Bank of Phoenix v. Glover](#), 62 Ariz. 538, 159 P.2d 292 (1945).
- 2 W. Va.—[State ex rel. Thompson v. Morton](#), 140 W. Va. 207, 84 S.E.2d 791 (1954).
Wyo.—[State v. Langley](#), 53 Wyo. 332, 84 P.2d 767 (1938).
- 3 N.C.—[State v. Felton](#), 239 N.C. 575, 80 S.E.2d 625 (1954).
- 4 Ky.—[Willis v. Lafayette-Phoenix Garage Co.](#), 202 Ky. 554, 260 S.W. 364 (1924).
N.Y.—[City of Buffalo v. Neubeck](#), 209 A.D. 386, 204 N.Y.S. 737 (4th Dep't 1924).
- 5 Ohio—[City of Cincinnati v. Board of Education of City School Dist. of City of Cincinnati](#), 63 Ohio App. 549, 17 Ohio Op. 273, 20 Ohio Op. 50, 31 Ohio L. Abs. 248, 27 N.E.2d 413 (1st Dist. Hamilton County 1940).

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16C C.J.S. Constitutional Law VIII XIX B Refs.

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

B. Substantive or Procedural Due Process

[Topic Summary](#) | [Correlation Table](#)

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Due Process

West's A.L.R. Digest, [Constitutional Law](#) 🔑 3865 to 3867

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16C C.J.S. Constitutional Law § 1820

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

B. Substantive or Procedural Due Process

§ 1820. Substantive or procedural due process, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3865 to 3867

Due process claims may take either of two forms: substantive due process or procedural due process. Substantive due process is far narrower in scope than procedural due process.

In the course of developing the meaning of the phrase, the courts have gone beyond the literal meaning of "due procedure" and have brought within it substantive as well as procedural rights.¹

Due process claims may take either of two forms: substantive due process or procedural due process.² Although each plays a distinct role in protecting an individual's right to due process, they frequently overlap and many cases do not adequately distinguish between the two.³

When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner and is referred to as "procedural" due process.⁴ It thus requires that the procedures provided by the State in effecting the deprivation of liberty or property are adequate in light of the affected interest.⁵

Substantive due process is far narrower in scope than procedural due process.⁶

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Footnotes

- 1 Okla.—*In re Lutker*, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
Or.—*Bowden v. Davis*, 205 Or. 421, 289 P.2d 1100 (1955).
Wyo.—*State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938).
As to procedural due process, generally, see § 1822.
As to nature and scope of due process in its procedural aspect, generally, see §§ 1872 to 1874.
- 2 U.S.—*Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996); *Dowd v. New Castle County, Del.*, 739 F. Supp. 2d 674 (D. Del. 2010); *Rivera-Freytes v. Puerto Rico*, 894 F. Supp. 2d 159 (D.P.R. 2012).
Criminal cases
There are two species of due process claims in criminal cases: state action that "shocks the conscience" violates the Due Process Clause's substantive component, and state action that deprives a defendant of a fundamentally fair trial violates the Due Process Clause's procedural component.
U.S.—*Stumpf v. Robinson*, 722 F.3d 739 (6th Cir. 2013), cert. denied, 134 S. Ct. 905, 187 L. Ed. 2d 789 (2014).
- 3 Fla.—*Westerheide v. State*, 767 So. 2d 637 (Fla. 5th DCA 2000), decision approved, 831 So. 2d 93 (Fla. 2002).
- 4 U.S.—*U.S. v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
Mass.—*Querubin v. Com.*, 440 Mass. 108, 795 N.E.2d 534 (2003).
As to deprivation of life, liberty, and property, generally, see §§ 1883 to 1908.
- 5 U.S.—*Cruz Serrano v. Sanchez-Bermudez*, 183 F. Supp. 2d 442 (D.P.R. 2001).
- 6 U.S.—*Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995); *Campos v. I.N.S.*, 32 F. Supp. 2d 1337 (S.D. Fla. 1998).

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16C C.J.S. Constitutional Law § 1821

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

B. Substantive or Procedural Due Process

§ 1821. Substantive due process

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3865, 3866

"Substantive due process" means that state action which deprives a person of life, liberty, or property must have a rational basis, and the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary." Substantive due process focuses on the result of governmental action, not its procedures.

"Substantive due process" means that state action which deprives a person of life, liberty, or property must have a rational basis, that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary."¹ Substantive due process protects the full panoply of individual rights from unwarranted encroachment by the government.² Substantive due process claims are of two types: the first type includes claims asserting the denial of a right, privilege, or immunity secured by the Constitution or by a federal statute, and the other type of claim is directed at official acts that may not occur regardless of procedural safeguards accompanying them.³

Substantive due process denotes a standard of reasonableness and limits a state's exercise of its police power.⁴ The essence of substantive due process is that a state cannot use its police power to take unreasonable, arbitrary, or capricious action against an individual.⁵ Substantive due process imposes limits on what a state may do regardless of what procedural protection is provided.⁶ It focuses on the result of governmental action, not its procedures.⁷ Thus, it forbids the government from infringing upon certain

fundamental liberty interests, no matter what process is afforded⁸ unless infringement is narrowly tailored to serve a compelling state interest.⁹ Substantive due process prohibits the government from engaging in conduct that shocks the conscience or that interferes with rights implicit in the concept of ordered liberty.¹⁰ A claim of violation of Fourteenth Amendment substantive due process requires proof that a defendant's conduct shocks the conscience or interferes with rights implicit in the concept of ordered liberty, or offends judicial notions of fairness, or is offensive to human dignity, or is taken with deliberate indifference to protected rights.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Use of word "terrorism" in Animal Enterprise Terrorism Act (AETA) did not violate defendant's right to substantive due process; liberty interest at stake was not fundamental liberty interest, and given serious harms statute was trying to address, including arson, bombing, and death threats, inclusion of word "terrorism" by Congress in non-codified title of AETA was not arbitrary or unreasonable. [U.S. Const. Amend. 14](#); [18 U.S.C.A. § 43](#). [United States v. Johnson](#), 875 F.3d 360 (7th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Bates v. State of Wis.](#), 823 F. Supp. 633 (E.D. Wis. 1993); [Guzman v. Piercy](#), 155 Idaho 928, 318 P.3d 918 (2014).
[Idaho—Guzman v. Piercy](#), 155 Idaho 928, 318 P.3d 918 (2014).
As to deprivation of life, liberty, and property, generally, see §§ 1883 to 1908.
- 2 [Fla.—Westerheide v. State](#), 767 So. 2d 637 (Fla. 5th DCA 2000), decision approved, 831 So. 2d 93 (Fla. 2002).
- 3 [U.S.—Hampton v. Hobbs](#), 106 F.3d 1281, 1997 FED App. 0059P (6th Cir. 1997); [Lillard v. Shelby County Bd. of Educ.](#), 76 F.3d 716, 107 Ed. Law Rep. 49, 1996 FED App. 0053P (6th Cir. 1996).
Absolute check on governmental action
Substantive due process is an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement them.
[U.S.—Love v. Pepersack](#), 47 F.3d 120 (4th Cir. 1995).
- 4 [Ill.—Webb v. Lane](#), 222 Ill. App. 3d 322, 164 Ill. Dec. 761, 583 N.E.2d 677 (5th Dist. 1991).
[N.C.—Petition of Smith](#), 82 N.C. App. 107, 345 S.E.2d 423 (1986).
As to effect of due process on police power, generally, see § 1868.
- 5 [Mont.—In re Estate of Bayers](#), 1999 MT 154, 295 Mont. 89, 983 P.2d 339 (1999).
- 6 [U.S.—Porter v. City of Detroit](#), 639 F. Supp. 589 (E.D. Mich. 1986); [Cruz Serrano v. Sanchez-Bermudez](#), 183 F. Supp. 2d 442 (D.P.R. 2001).
- 7 [U.S.—Molloy v. Blanchard](#), 907 F. Supp. 46 (D.R.I. 1995), *aff'd*, 115 F.3d 86 (1st Cir. 1997).
- 8 [U.S.—Reno v. Flores](#), 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); [U.S. v. Salerno](#), 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
[Colo.—People v. Garlotte](#), 958 P.2d 469 (Colo. App. 1997).
- 9 [U.S.—Reno v. Flores](#), 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); [U.S. v. Salerno](#), 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
[Colo.—People v. Garlotte](#), 958 P.2d 469 (Colo. App. 1997).
- 10 [U.S.—U.S. v. Salerno](#), 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); [Robinson v. Howell](#), 902 F. Supp. 836 (S.D. Ind. 1995).
[Colo.—People v. Garlotte](#), 958 P.2d 469 (Colo. App. 1997).

11

N.M.—[State v. Murillo](#), 2015-NMCA-046, 2015 WL 270053 (N.M. Ct. App. 2015).

U.S.—[Aguilera v. Wright County, Iowa](#), 50 F. Supp. 3d 1057 (N.D. Iowa 2014).

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16C C.J.S. Constitutional Law § 1822

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

B. Substantive or Procedural Due Process

§ 1822. Procedural due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867

Procedural due process means that persons whose rights may be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified.

Procedural due process means that persons whose rights may be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified; correlatively, this right to notice and opportunity to be heard must be extended at a meaningful time and in a meaningful manner.¹ The elements of procedural due process are notice and an opportunity to be heard,² or to defend or respond,³ in an orderly proceeding,⁴ adapted to the nature of the case in accord with established rules.⁵

"Property interest" protected by procedural due process is defined as a legitimate claim of entitlement, more than a desire or unilateral expectation; property interest derives not from the Constitution but from an independent source such as state law rules or understandings which define its dimensions.⁶

When a state action threatens to deprive a person of a protected liberty or property interest, a person is entitled to procedural due process.⁷ Thus, procedural due process permits a state to deprive a person of life, liberty, or property when it provides a

procedural remedy.⁸ However, procedural due process prohibits the deprivation of a protected interest unless the procedures provided are adequate to ensure that it will not be effected arbitrarily.⁹

Procedural due process requires that procedures provided by the State in effecting deprivation of liberty or property are adequate in light of the affected interest.¹⁰ The framework to evaluate the due process sufficiency of particular procedures requires consideration of three distinct factors: (1) the private interest that will be affected by official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.¹¹

CUMULATIVE SUPPLEMENT

Cases:

The *Mathews v. Eldridge* framework applies to evaluate claims of procedural due process violations when the urgency of a prompt post-seizure hearing on litigant's demand for judicial determination is the paramount question. [U.S. Const. Amend. 14, § 1](#); [Minn. Const. art. 1, § 7](#). [Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461, 924 N.W.2d 594 \(Minn. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Ariz.—Comeau v. Arizona State Bd. of Dental Examiners, 196 Ariz. 102, 993 P.2d 1066 \(Ct. App. Div. 1 1999\)](#).
[La.—Moore v. Ware, 839 So. 2d 940 \(La. 2003\)](#).
- 2 [U.S.—Fawcett v. Bablitch, 962 F.2d 617 \(7th Cir. 1992\)](#).
[Ariz.—Comeau v. Arizona State Bd. of Dental Examiners, 196 Ariz. 102, 993 P.2d 1066 \(Ct. App. Div. 1 1999\)](#).
[Ga.—King v. State, 272 Ga. 788, 535 S.E.2d 492 \(2000\)](#).
[Haw.—DW Aina Lea Development, LLC v. Bridge Aina Lea, LLC, 134 Haw. 187, 339 P.3d 685 \(2014\)](#).
[Pa.—Arnold v. W.C.A.B. \(Lacour Painting, Inc.\), 110 A.3d 1063 \(Pa. Commw. Ct. 2015\)](#).
[Wash.—Didlake v. Washington State, 345 P.3d 43 \(Wash. Ct. App. Div. 1 2015\)](#).
- 3 [N.C.—Petition of Smith, 82 N.C. App. 107, 345 S.E.2d 423 \(1986\)](#).
[Wash.—State v. Cozza, 71 Wash. App. 252, 858 P.2d 270 \(Div. 3 1993\)](#).
- 4 [Ill.—Webb v. Lane, 222 Ill. App. 3d 322, 164 Ill. Dec. 761, 583 N.E.2d 677 \(5th Dist. 1991\)](#).
[La.—McMahon v. McMahon, 829 So. 2d 584 \(La. Ct. App. 5th Cir. 2002\)](#).
[N.C.—Petition of Smith, 82 N.C. App. 107, 345 S.E.2d 423 \(1986\)](#).
- 5 [La.—McMahon v. McMahon, 829 So. 2d 584 \(La. Ct. App. 5th Cir. 2002\)](#).
- 6 [U.S.—Campana v. City of Greenfield, 164 F. Supp. 2d 1078 \(E.D. Wis. 2001\), judgment aff'd, 38 Fed. Appx. 339 \(7th Cir. 2002\)](#).
- 7 [Iowa—Meyer v. Jones, 696 N.W.2d 611 \(Iowa 2005\)](#).
- 8 [U.S.—Madden v. City of Meriden, 602 F. Supp. 1160 \(D. Conn. 1985\); Porter v. City of Detroit, 639 F. Supp. 589 \(E.D. Mich. 1986\)](#).
- 9 [Ill.—Dennis E. v. O'Malley, 256 Ill. App. 3d 334, 194 Ill. Dec. 865, 628 N.E.2d 362 \(1st Dist. 1993\)](#).
- 10 [U.S.—Cruz Serrano v. Sanchez-Bermudez, 183 F. Supp. 2d 442 \(D.P.R. 2001\)](#).

- 11 U.S.—*Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); *McDonald v. Wise*, 769 F.3d 1202 (10th Cir. 2014).
- Alaska—*Barber v. State, Dept. of Corrections*, 314 P.3d 58 (Alaska 2013).
- Conn.—*Pagan v. Carey Wiping Materials Corp.*, 144 Conn. App. 413, 73 A.3d 784 (2013), certification denied, 310 Conn. 925, 77 A.3d 142 (2013).
- Idaho—*Platz v. State*, 154 Idaho 960, 303 P.3d 647 (Ct. App. 2013).
- Kan.—*In re Ontiberos*, 295 Kan. 10, 287 P.3d 855 (2012).
- Wash.—*In re A.W.*, 182 Wash. 2d 689, 344 P.3d 1186 (2015).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

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16C C.J.S. Constitutional Law § 1823

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XIX. Due Process of Law

C. Constitutional Guaranty

1. General Considerations

§ 1823. Antecedents to constitutional right

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3840 to 3842

The right to due process of law is not a right wholly dependent for its existence upon any statute or constitutional provision because the right to enjoy life and property is a fundamental right existing prior to the adoption of the United States Constitution.

The right to due process of law is not a right wholly dependent for its existence upon any statute or constitutional provision because the right to enjoy life and property is a fundamental right existing prior to the adoption of the United States Constitution.¹ One due process test is to ascertain what were settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence and whether such usages and modes of proceeding were followed in the United States after it became a nation.²

Recognition of the rule that a person shall not be deprived of life, liberty, or property without an opportunity to be heard in defense of his or her right is of ancient origin, being older than written constitutions, and having been interwoven in the common law long prior to the adoption of the Magna Carta.³

The Magna Carta established the right to the preservation of life, liberty, and property subject to the "law of the land," which is now more commonly refer to as due process of law.⁴ The proposition that a person shall not be deprived of life, liberty, or property without due process of law is as old as any principle of civilized government and is found in the Magna Carta and in substance, if not in form, in nearly all constitutions adopted by the several states.⁵ Due process is founded on the principles of natural justice,⁶ and it is the foundation of the constitutional guarantees of due process of law.⁷ It was expressed in the provision of the Magna Carta which protected every freeman in the enjoyment of natural rights unless deprived of them "by the Judgment of his Peers, or the Law of the Land,"⁸ and from this original are derived the guarantees expressed in the various American constitutions.⁹

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Footnotes

- 1 U.S.—*U.S. v. Bailes*, 120 F. Supp. 614 (S.D. W. Va. 1954).
- 2 Ky.—*Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972).
- 3 Pa.—*Hess v. Westerwick*, 366 Pa. 90, 76 A.2d 745 (1950).
Wash.—*State v. Cater's Motor Freight System*, 27 Wash. 2d 661, 179 P.2d 496 (1947).
- 4 Ky.—*Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423 (Ky. 1998), as modified, (Oct. 15, 1998).
As to "due process of law" and "law of the land," see § 1816.
- 5 Ill.—*People ex rel. Harris v. Parrish Oil Production, Inc.*, 249 Ill. App. 3d 664, 190 Ill. Dec. 780, 622 N.E.2d 810 (5th Dist. 1993).
- 6 N.Y.—*Rosenblum v. Rosenblum*, 181 Misc. 78, 42 N.Y.S.2d 626 (Sup 1943).
Secured by Magna Carta and constitutions
Due process is a principle of natural justice secured by the Magna Carta and successive constitutions of the nation and the states.
N.J.—*Horsman Dolls v. Unemployment Compensation Commission*, 7 N.J. 541, 82 A.2d 177 (1951).
- 7 U.S.—*Munn v. People of State of Illinois*, 94 U.S. 113, 24 L. Ed. 77, 1876 WL 19615 (1876).
N.Y.—*Rosenblum v. Rosenblum*, 181 Misc. 78, 42 N.Y.S.2d 626 (Sup 1943).
- 8 U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
Ohio—*Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 513 N.E.2d 776 (1987).
Pa.—*Com. v. Davis*, 526 Pa. 428, 586 A.2d 914 (1991).
Origin in judicial parlance
The phrase "due process of law" apparently originated in American judicial parlance with Lord Coke, who in construing the language of the Magna Carta "That no man shall be taken or imprisoned—or deprived of life, liberty or property but by the judgment of his peers or the law of the land" said that phrase "law of the land" meant "due process of law."
Utah—*Christiansen v. Harris*, 109 Utah 1, 163 P.2d 314 (1945).
- 9 U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
Md.—*Slansky v. State*, 192 Md. 94, 63 A.2d 599 (1949).
N.J.—*Camden County v. Pennsauken Sewerage Authority*, 15 N.J. 456, 105 A.2d 505 (1954).

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16C C.J.S. Constitutional Law § 1824

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

1. General Considerations

§ 1824. Due process under Federal Constitution

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3840, 3849, 3855

The phrase "due process of law" has the same meaning in both the Fifth and the Fourteenth Amendments to the United States Constitution.

The phrase "due process of law" has the same meaning in both the Fifth and the Fourteenth Amendments to the United States Constitution.¹ Due process of law in the Fifth Amendment refers to that law of the land which derives its authority from the legislative powers conferred upon the Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of common law.² In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice that lie at the base of all American civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.³

The purpose of the Fourteenth Amendment is to place the same limitation on the states as is imposed on the federal government by the Fifth Amendment.⁴ The Fifth and Fourteenth Amendments to the Constitution apply only to the federal government

and to the states, respectively, and derivatively to those whose actions can fairly be attributed to federal or state government.⁵ The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the states, from depriving any person of property without due process of law.⁶

While the Due Process Clauses of the Fifth and Fourteenth Amendments are said to be coextensive,⁷ the protection afforded by the Fifth Amendment is not always coextensive with that afforded by the Fourteenth Amendment since there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state.⁸ Thus, a due process inquiry under the Fifth Amendment is broader than that under the parallel clause of the Fourteenth Amendment.⁹

Substantive due process.

As far as substantive due process is concerned, the principles which apply to the Fourteenth Amendment are also applicable to the Fifth Amendment;¹⁰ substantive due process analyses under the Fifth and Fourteenth Amendments are identical.¹¹

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Footnotes

- 1 U.S.—*Schatte v. International Alliance of Theatrical Stage Emp. and Moving Picture Operators of U.S. and Canada*, 165 F.2d 216 (C.C.A. 9th Cir. 1948); *Bartlett Trust Co. v. Elliott*, 30 F.2d 700 (E.D. Mo. 1929), *aff'd*, 40 F.2d 351 (C.C.A. 8th Cir. 1930).
N.C.—*State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).
For a discussion of the Fifth Amendment, generally, see §§ 1827 to 1831.
As to Fourteenth Amendment discussed, generally, see §§ 1832 to 1838.
- 2 U.S.—*Hurtado v. People of State of California*, 110 U.S. 516, 4 S. Ct. 292, 28 L. Ed. 232 (1884).
Conn.—*State v. Sixth Taxing Dist.*, 104 Conn. 192, 132 A. 561 (1926).
Wash.—*Payne v. Smith*, 30 Wash. 2d 646, 192 P.2d 964 (1948).
- 3 U.S.—*Hurtado v. People of State of California*, 110 U.S. 516, 4 S. Ct. 292, 28 L. Ed. 232 (1884).
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- 4 U.S.—*U.S. v. Josephson*, 165 F.2d 82 (C.C.A. 2d Cir. 1947).
- 5 U.S.—*Russell v. Salve Regina College*, 649 F. Supp. 391, 36 Ed. Law Rep. 1176 (D.R.I. 1986).
- 6 U.S.—*Dusenbery v. U.S.*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).
- 7 U.S.—*U.S. v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005); *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727, 189 L. Ed. 2d 779 (2014).
- 8 U.S.—*De Malherbe v. International Union of Elevator Constructors*, 476 F. Supp. 649 (N.D. Cal. 1979).
- 9 U.S.—*Board of Trustees Sheet Metal Workers' Nat. Pension Fund v. McD Metals, Inc.*, 964 F. Supp. 1040 (E.D. Va. 1997).
- 10 U.S.—*Miller v. Howe Sound Min. Co.*, 77 F. Supp. 540 (E.D. Wash. 1948).
As to substantive due process, generally, see § 1821.
- 11 U.S.—*McIntyre v. U.S.*, 336 F. Supp. 2d 87 (D. Mass. 2004).

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16C C.J.S. Constitutional Law § 1825

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

1. General Considerations

§ 1825. Due process under state constitutions

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3847

The due process clause in a state constitution requires the same guarantees or level of due process as the Federal Constitution.

State constitutions contain a similar guaranty, either in the words of the Due Process Clauses of the Fifth or Fourteenth Amendment or in words of the same import and meaning, such provisions usually being construed to be identical in scope, import, or purpose with those of the Federal Constitution.¹ The due process clause in a state constitution requires the same guarantees or level of due process as the Federal Constitution,² or to put it another way, due process protections encompassed within a state constitution are often coextensive with those of its federal counterpart.³

Due process provisions in state constitutions apply only to actions by the State⁴ and do not prescribe anything not comprehended by the provision of the Federal Constitution as to due process.⁵

The protection afforded by the due process provisions of state constitutions are not more restrictive than the Due Process Clause of the Fourteenth Amendment,⁶ and a violation of federal due process may automatically be a violation of the due process clause of a state constitution.⁷ Insofar as the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a greater protection than does the due process provision of a state constitution, the Federal Constitution must prevail.⁸ In deciding substantive due process claims a state court may first look to the state constitution and then, if necessary, to the Federal Constitution to determine whether it provides the claimants greater rights, and if the federal law is not more favorable to the claimants, the court will make no separate federal analysis.⁹

Federal law does not preclude a state constitution from providing more rigorous protections for the due process rights of residents of the state.¹⁰ A state may, under its own constitutional due process provisions, create protections for its citizens that are not be required under the federal due process concept.¹¹

Inherent in the due process clause of the state constitution is the concept of equal protection of the laws.¹² Equal protection is a constitutionally recognized right included within the due process clause of a state constitution.¹³

Due process clauses of the state and federal constitutions are subject to the same analysis,¹⁴ and the same analysis is applicable to claims under Due Process Clause of the Federal Constitution and the due course of law clause of a state constitution.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

The due process requirements of Nebraska's Constitution are similar to those of the Federal Constitution. [U.S. Const. Amend. 14](#); [Neb. Const. art. 1, § 3](#). [State v. Mann](#), 302 Neb. 804, 925 N.W.2d 324 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ala.—[Brown v. Longiotti](#), 420 So. 2d 71 (Ala. 1982).
Idaho—[State v. Saunders](#), 124 Idaho 334, 859 P.2d 370 (Ct. App. 1993).
Minn.—[State v. Krause](#), 817 N.W.2d 136 (Minn. 2012).
Equivalent
Ohio—[Groch v. Gen. Motors Corp.](#), 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).
- 2 Colo.—[Air Pollution Variance Bd. v. Western Alfalfa Corp.](#), 191 Colo. 455, 553 P.2d 811 (1976).
Tex.—[Hartford Cas. Ins. Co. v. State](#), 159 S.W.3d 212 (Tex. App. Austin 2005).
- 3 Me.—[Doe I v. Williams](#), 2013 ME 24, 61 A.3d 718 (Me. 2013).
Neb.—[State v. Thomas](#), 268 Neb. 570, 685 N.W.2d 69 (2004).
N.J.—[Pheasant Bridge Corp. v. Township of Warren](#), 169 N.J. 282, 777 A.2d 334 (2001).
Okla.—[Henry v. Schmidt](#), 2004 OK 34, 91 P.3d 651 (Okla. 2004).
Similar protections
Tenn.—[Bailey v. Blount County Bd. of Educ.](#), 303 S.W.3d 216, 254 Ed. Law Rep. 420 (Tenn. 2010).
- 4 Mich.—[National Airport Corp. v. Wayne Bank](#), 73 Mich. App. 572, 252 N.W.2d 519 (1977).
- 5 Cal.—[Manford v. Memil Singh](#), 40 Cal. App. 700, 181 P. 844 (3d Dist. 1919).

Harmony of rules

It is appropriate that state rules respecting due process principles be in harmony with federal rules on the same subject, in the same area.

Mont.—[Matter of M. D. Y. R.](#), 177 Mont. 521, 582 P.2d 758 (1978).

6 Minn.—[Anderson v. City of St. Paul](#), 226 Minn. 186, 32 N.W.2d 538 (1948).

7 Me.—[Pool Beach Ass'n v. City of Biddeford](#), 328 A.2d 131 (Me. 1974).

8 Wash.—[Olympic Forest Products, Inc. v. Chaussee Corp.](#), 82 Wash. 2d 418, 511 P.2d 1002 (1973).

9 N.H.—[Caspersen v. Town of Lyme](#), 139 N.H. 637, 661 A.2d 759 (1995).

10 Alaska—[Doe v. State, Dept. of Public Safety](#), 92 P.3d 398 (Alaska 2004).

11 Mass.—[McClory v. Merkert](#), 383 Mass. 883, 420 N.E.2d 349 (1981).

N.Y.—[People v. Isaacson](#), 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).

12 W. Va.—[Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health](#), 214 W. Va. 818, 591 S.E.2d 744 (2003).

As to equal protection of the laws, generally, see §§ 1256 to 1609.

13 Colo.—[People in Interest of S. P. B.](#), 651 P.2d 1213 (Colo. 1982).

14 Mass.—[School Committee of Hatfield v. Board of Ed.](#), 372 Mass. 513, 363 N.E.2d 237 (1977).

15 Ind.—[In re Paternity of M.G.S.](#), 756 N.E.2d 990 (Ind. Ct. App. 2001).

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16C C.J.S. Constitutional Law § 1826

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

1. General Considerations

§ 1826. Construction of constitutional due process provisions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3840

A constitutional due process provision should be liberally construed in order to effectuate its purpose.

Due process clauses, whether federal or state, are not enumerations of the rights protected and they must be read in conjunction with other provisions in the same constitution in order to determine their coverage.¹

Due process is not susceptible to reduction to a mathematical formula;² there is no table of weights and measures for ascertaining what constitutes due process.³ The prohibition of a due process clause is not always strictly applied, a certain amount of plasticity being permitted to fit the circumstances,⁴ and it has been said to be a concept the application of which is less a matter of rule than concepts envisaged in other specific and particular provisions of the Bill of Rights.⁵

A constitutional due process provision should be liberally construed⁶ in order to effectuate its purpose.⁷ However, it has also been said that the courts cannot go very far against the literal meaning and plain intent of the constitutional text.⁸

The Due Process Clauses of the Federal Constitution should be construed in the light of preexisting law.⁹ Questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases.¹⁰

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Footnotes

- 1 Ark.—*Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978).
Read in conjunction with amendment with respect to victim's rights
 Wis.—*State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479 (2004).
Right to jury trial
 The Sixth Amendment right to a jury trial is read in conjunction with the due process requirement in the Fourteenth Amendment.
 Md.—*Young v. State*, 138 Md. App. 380, 771 A.2d 525 (2001), judgment aff'd, 370 Md. 686, 806 A.2d 233 (2002).
- 2 Alaska—*State, Dept. of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056 (Alaska 2004).
 Pa.—*Com. v. Groff*, 378 Pa. Super. 353, 548 A.2d 1237 (1988).
- 3 U.S.—*U.S. v. Witmer*, 115 F. Supp. 19 (M.D. Pa. 1953), judgment aff'd, 213 F.2d 95 (3d Cir. 1954), judgment aff'd, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955).
 Pa.—*Com. v. Santiago*, 405 Pa. Super. 56, 591 A.2d 1095 (1991).
- 4 N.J.—*In re North Jersey Title Ins. Co.*, 120 N.J. Eq. 148, 184 A. 420 (Ch. 1936), aff'd, 120 N.J. Eq. 608, 187 A. 146 (Ct. Err. & App. 1936).
 Due process as a flexible concept, generally, see § 1867.
- 5 U.S.—*U. S. ex rel. Sheffield v. Waller*, 126 F. Supp. 537 (W.D. La. 1954).
 N.C.—*State v. Hedgebeth*, 228 N.C. 259, 45 S.E.2d 563 (1947).
 S.D.—*State ex rel. Baker v. Jameson*, 72 S.D. 638, 38 N.W.2d 441 (1949).
- 6 Ill.—*People v. Spain*, 307 Ill. 283, 138 N.E. 614 (1923).
 Kan.—*Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).
 Mich.—*People ex rel. Moll v. Danziger*, 238 Mich. 39, 213 N.W. 448, 52 A.L.R. 136 (1927).
Suppression of offensive conditions
 The Due Process Clause is not to be so broadly construed that Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to public welfare.
 U.S.—*American Federation of Labor, Ariz State Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 69 S. Ct. 260, 93 L. Ed. 222 (1949); *Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).
- 7 Kan.—*Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).
- 8 U.S.—*Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist.*, 258 U.S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922).
- 9 U.S.—*De Pauw University v. Brunk*, 53 F.2d 647 (W.D. Mo. 1931), aff'd, 285 U.S. 527, 52 S. Ct. 405, 76 L. Ed. 924 (1932).
 Ala.—*Ex parte Wetzel*, 243 Ala. 130, 8 So. 2d 824 (1942).
- 10 U.S.—*Pearson v. McGraw*, 308 U.S. 313, 60 S. Ct. 211, 84 L. Ed. 293 (1939).

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16C C.J.S. Constitutional Law § 1827

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

2. Fifth Amendment

§ 1827. Due process under Fifth Amendment, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3935

The Fifth Amendment to the United States Constitution, providing that no person shall be deprived of life, liberty, or property, without due process of law, constitutes a restriction or limitation on the federal government or its powers and is not concerned with, or does not limit, action by a state.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law.¹ The Fifth Amendment constitutes a restriction or limitation on the federal government, or its powers,² and is not concerned with, or does not limit, action by a state;³ it governs the conduct of the federal government and its officers and employees⁴ and does not regulate the activities of state officials or state actors.⁵

The Fifth Amendment is not directed against, and does not limit, the actions of individuals,⁶ or private entities,⁷ unless the entity's actions can be fairly attributed to the federal government.⁸ Thus, the Fifth Amendment due process guarantee protects individuals from intrusions by individuals acting in the place of the government.⁹ Whether liability arises in a given case is resolved under the so-called "state action" doctrine.¹⁰

Impairment of preexisting contracts.

Principles embodied in the Fifth Amendment's Due Process Clause have not been held coextensive with prohibitions existing against state impairments of preexisting contracts, and standards imposed on economic legislation by due process clauses are less searching.¹¹

CUMULATIVE SUPPLEMENT

Cases:

The Fifth Amendment applies only to the federal government or federal actions and does not apply to state and municipality actors. [U.S. Const. Amend. 5](#). [Jackson v. Stair](#), 944 F.3d 704 (8th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S. Const. Amend. V.](#)
As to deprivation of life, liberty, or property, generally, see §§ 1883 to 1908.
- 2 [U.S.—Zutz v. Nelson](#), 601 F.3d 842 (8th Cir. 2010); [Guichard v. Town of Brookhaven](#), 26 F. Supp. 3d 219 (E.D. N.Y. 2014); [Seitz v. DeQuarto](#), 777 F. Supp. 2d 492 (S.D. N.Y. 2011).
[Cal.—In re Alcala](#), 222 Cal. App. 3d 345, 271 Cal. Rptr. 674 (1st Dist. 1990).
[La.—State v. Green](#), 724 So. 2d 812 (La. Ct. App. 2d Cir. 1998), writ denied, 743 So. 2d 1251 (La. 1999).
[Me.—State v. Rees](#), 2000 ME 55, 748 A.2d 976 (Me. 2000).
[Mich.—Federal Home Loan Mortg. Ass'n v. Kelley](#), 306 Mich. App. 487, 858 N.W.2d 69 (2014).
- 3 [U.S.—Seitz v. DeQuarto](#), 777 F. Supp. 2d 492 (S.D. N.Y. 2011); [Cruz v. Puerto Rico Power Authority](#), 878 F. Supp. 2d 316 (D.P.R. 2012).
[Ind.—State v. Swafford](#), 250 Ind. 541, 237 N.E.2d 580 (1968).
- 4 [U.S.—Peoria School of Business, Inc. v. Accrediting Council for Continuing Educ. and Training](#), 805 F. Supp. 579, 79 Ed. Law Rep. 93 (N.D. Ill. 1992); [Schanzer v. Rutgers University](#), 934 F. Supp. 669, 112 Ed. Law Rep. 229 (D.N.J. 1996).
- 5 [U.S.—Schanzer v. Rutgers University](#), 934 F. Supp. 669, 112 Ed. Law Rep. 229 (D.N.J. 1996).
- 6 [U.S.—Freilich v. Board of Directors of Upper Chesapeake Health, Inc.](#), 142 F. Supp. 2d 679 (D. Md. 2001), judgment aff'd, 313 F.3d 205 (4th Cir. 2002); [Nuzzo v. Northwest Airlines, Inc.](#), 887 F. Supp. 28 (D. Mass. 1995); [Cruz v. Puerto Rico Power Authority](#), 878 F. Supp. 2d 316 (D.P.R. 2012).
- 7 **Rail corporation**
[U.S.—Morin v. Consolidated Rail Corp.](#), 810 F.2d 720 (7th Cir. 1987).
- 8 [U.S.—Morin v. Consolidated Rail Corp.](#), 810 F.2d 720 (7th Cir. 1987).
- 9 [U.S.—Yeager v. General Motors Corp.](#), 67 F. Supp. 2d 796 (N.D. Ohio 1999), aff'd, 265 F.3d 389, 2001 FED App. 0311P (6th Cir. 2001).
- 10 [U.S.—Committee of U.S. Citizens Living in Nicaragua v. Reagan](#), 859 F.2d 929 (D.C. Cir. 1988).
What constitutes federal action sufficient to invoke protection of Due Process Clause, generally, see § 1839.
- 11 [U.S.—Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

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16C C.J.S. Constitutional Law § 1828

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

2. Fifth Amendment

§ 1828. Due process under Fifth Amendment as applied to political subdivisions of state or officers thereof

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑3938

The Due Process Clause of the Fifth Amendment does not regulate the activities of the political subdivisions of a state or the actions of local officers.

The Due Process Clause of the Fifth Amendment does not regulate the activities of the political subdivisions of a state,¹ such as the actions of the municipal government.²

The Fifth Amendment Due Process Clause is not applicable to the actions of local officers,³ including municipal police or law enforcement officers.⁴ An arrestee's due process claim under the Fifth Amendment cannot be sustained where the defendants are municipal, rather than federal, officers.⁵

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Footnotes

- 1 U.S.—Clark v. City of Lake St. Louis, 735 F. Supp. 333 (E.D. Mo. 1990); Shoemaker v. City of Lock Haven, 906 F. Supp. 230 (M.D. Pa. 1995).
- 2 U.S.—Hill v. City of Houston, 991 F. Supp. 847 (S.D. Tex. 1998).
- 3 U.S.—Hardy v. Town of Hayneville, 50 F. Supp. 2d 1176 (M.D. Ala. 1999); Williams v. Blaisdell, 173 F. Supp. 2d 574 (N.D. Tex. 2001).
- 4 U.S.—Hardy v. Town of Hayneville, 50 F. Supp. 2d 1176 (M.D. Ala. 1999); Williams v. Blaisdell, 173 F. Supp. 2d 574 (N.D. Tex. 2001).
- 5 U.S.—Birdsall v. City of Hartford, 249 F. Supp. 2d 163 (D. Conn. 2003).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

2. Fifth Amendment

§ 1829. Due process under Fifth Amendment as applied to District of Columbia

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3939

The Due Process Clause of the Fifth Amendment is applicable in the District of Columbia.

The Due Process Clause of the Fifth Amendment is applicable in the District of Columbia¹ because the District of Columbia is a political entity created by the federal government.²

The Due Process Clause of the Fifth Amendment imposes the same equal protection requirements on the federal government and the District of Columbia as the Fourteenth Amendment's Equal Protection Clause imposes on the states.³ Equal protection concepts are inherent in the due process of law guaranteed to citizens of the District of Columbia by the Fifth Amendment⁴ or are embodied in the Due Process Clause of the Fifth Amendment, which is applicable to the District of Columbia.⁵ Constitutional protections, applicable to the states through the Fourteenth Amendment, although not directly applicable to the District of Columbia, extend to the District through the Due Process Clause of the Fifth Amendment.⁶

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Footnotes

- 1 U.S.—*Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), opinion supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955); *English v. District of Columbia*, 717 F.3d 968 (D.C. Cir. 2013); *American Council of Life Insurers v. District of Columbia Health Benefit Exchange Authority*, 2014 WL 5893464 (D.D.C. 2014).
D.C.—*Clark v. Clark*, 638 A.2d 667 (D.C. 1994).
- 2 U.S.—*Kutschbach v. Davies*, 885 F. Supp. 1079 (S.D. Ohio 1995).
- 3 U.S.—*American Towers, Inc. v. Williams*, 146 F. Supp. 2d 27 (D.D.C. 2001), *aff'd*, 50 Fed. Appx. 448 (D.C. Cir. 2002).
As to equal protection of the laws, generally, see §§ 1256 to 1609.
- 4 U.S.—*Bulluck v. Washington*, 468 F.2d 1096 (D.C. Cir. 1972); *Curry-Bey v. Jackson*, 422 F. Supp. 926 (D.D.C. 1976).
- 5 D.C.—*Hessey v. Burden*, 615 A.2d 562 (D.C. 1992).
- 6 D.C.—*In re T.J.*, 666 A.2d 1 (D.C. 1995).

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16C C.J.S. Constitutional Law § 1830

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

2. Fifth Amendment

§ 1830. Due process under Fifth Amendment as applied to Indian tribes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3936

The Fifth Amendment does not apply to the actions of Indian tribes.

The Fifth Amendment does not apply to the actions of Indian tribes.¹ Indian tribes, while engaged in processes of local government, are not subject to the Fifth Amendment.² An Indian tribe or nation is not a federal instrumentality and is not within the reach of the Fifth Amendment, and the due process restraint places restrictions on the Indian tribes only when it is so provided by Congressional enactment.³

An employee's claim that his or her discharge by an Indian tribe is in violation of the Fifth Amendment is precluded because the Fifth Amendment acts as a limit on federal governmental action only.⁴

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Footnotes

- 1 U.S.—[Wardle v. Ute Indian Tribe](#), 623 F.2d 670 (10th Cir. 1980); [United Nuclear Corp. v. Clark](#), 584 F.
Supp. 107 (D.D.C. 1984).
- 2 U.S.—[Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe](#), 370 F.2d 529 (8th Cir. 1967).
- 3 Fla.—[Askew v. Seminole Tribe of Florida, Inc.](#), 474 So. 2d 877 (Fla. 4th DCA 1985).
- 4 U.S.—[Wardle v. Ute Indian Tribe](#), 623 F.2d 670 (10th Cir. 1980).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

2. Fifth Amendment

§ 1831. Due process under Fifth Amendment as applied to territories

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3940

The Due Process Clause of the Fifth Amendment applies to territories.

The Due Process Clause of the Fifth Amendment applies to territories.¹ Thus, actions of the United States in its trust territories are constrained by due process.²

Whatever in the Constitution limits or restrains governmental powers of the United States must equally limit or restrain the authority of a territorial government created by a legislative act of the United States government.³

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Footnotes

- ¹ U.S.—*Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 637 F. Supp. 1398 (D.D.C. 1986), order aff'd, 830 F.2d 374 (D.C. Cir. 1987).

- 2 U.S.—[Ralpho v. Bell](#), 569 F.2d 607 (D.C. Cir. 1977).
3 U.S.—[Anderson v. Scholes](#), 12 Alaska 295, 83 F. Supp. 681 (Terr. Alaska 1949).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1832. Fourteenth Amendment, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3936, 3937

The Fourteenth Amendment to the United States Constitution, providing that a state shall not deprive any person of life, liberty, or property without due process of law, constitutes a limitation on the powers or actions of the states and does not apply to the federal government.

The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty, or property, without due process of law.¹ The function of this provision is to exact from the states observance of basic liberties.² As clearly indicated by the language used, the Fourteenth Amendment constitutes a limitation on the powers,³ or actions,⁴ of the states.

The jurisdiction of a state must confine itself to persons, property, and activities within its boundaries, and any attempt to control persons or things beyond the boundaries is ineffective as violative of due process.⁵ The mere fact that state action may have repercussions beyond state lines, however, is of no judicial significance on question of the denial of due process of law so long as the action is not within that domain which the Constitution forbids.⁶

The Fourteenth Amendment due process guarantee does not apply to the federal government,⁷ federal officials,⁸ or federal proceedings.⁹

The Fourteenth Amendment protects people from the State;¹⁰ it furnishes a guaranty against any encroachment by the State on the fundamental rights that belong to every citizen.¹¹

The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.¹² Neither state legislation, state decisions, nor congressional action can modify or affect the requirements of due process under the Fourteenth Amendment,¹³ or shelter a governmental officer, board, or commission from those requirements.¹⁴

Due process in the Fourteenth Amendment is due process according to the constitution and the laws of the particular state¹⁵ and not the process of another state or of the United States;¹⁶ what due process requires in one state is not necessarily due process in another,¹⁷ and the Amendment does not require that process of law be the same in all the states¹⁸ or the same as that prescribed for the federal courts.¹⁹

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Footnotes

- 1 [U.S. Const. Amend. XIV.](#)
As to deprivation of life, liberty, or property, generally, see §§ 1883 to 1908.
- 2 [U.S.—U.S. ex rel. Auld v. Warden of N.J. State Penitentiary](#), 187 F.2d 615 (3d Cir. 1951).
- 3 [U.S.—Wilson v. Ake](#), 354 F. Supp. 2d 1298, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005); [Johnson v. U.S. Dept. of Interior](#), 185 F. Supp. 2d 713 (W.D. Ky. 2001); [In re Rusco Industries, Inc.](#), 104 B.R. 548 (Bankr. S.D. Ga. 1989).
- 4 [U.S.—National Collegiate Athletic Ass'n v. Tarkanian](#), 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469, 50 Ed. Law Rep. 17 (1988); [LaRouche v. Fowler](#), 152 F.3d 974 (D.C. Cir. 1998).
- 5 [Ohio—State of Minn. v. Karp](#), 84 Ohio App. 51, 39 Ohio Op. 96, 52 Ohio L. Abs. 513, 84 N.E.2d 76 (1st Dist. Hamilton County 1948).
- 6 [U.S.—State Farm Mut. Auto. Ins. Co. v. Duel](#), 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945).
- 7 [U.S.—In re Paques, Inc.](#), 277 B.R. 615 (Bankr. E.D. Pa. 2000); [Harris v. United States](#), 118 Fed. Cl. 180 (2014).
- Not applicable to Congress**
[U.S.—Bruinooge v. U. S.](#), 213 Ct. Cl. 26, 550 F.2d 624 (1977).
- Not applicable to District of Columbia**
[U.S.—Collier v. District of Columbia](#), 46 F. Supp. 3d 6 (D.D.C. 2014); [Kingman Park Civic Association v. Gray](#), 27 F. Supp. 3d 142 (D.D.C. 2014), subsequent determination, 27 F. Supp. 3d 171 (D.D.C. 2014).
- 8 [U.S.—Weiss v. Marsh](#), 543 F. Supp. 1115 (M.D. Ala. 1981); [Storey v. Rubin](#), 976 F. Supp. 1478 (N.D. Ga. 1997), *aff'd*, 144 F.3d 56 (11th Cir. 1998).
- 9 [U.S.—U.S. ex rel. Dong Wing Ott v. Shaughnessy](#), 116 F. Supp. 745 (S.D. N.Y. 1953), *aff'd*, 220 F.2d 537 (2d Cir. 1955).
- 10 [U.S.—Bullock v. Resolution Trust Corp.](#), 918 F. Supp. 1001 (S.D. Miss. 1995).
- 11 [U.S.—U.S. v. Morrison](#), 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
- 12 [U.S.—Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
[Alaska—Bozarth v. Atlantic Richfield Oil Co., Inc.](#), 833 P.2d 2 (Alaska 1992).
[Wyo.—Matter of GP](#), 679 P.2d 976 (Wyo. 1984).
- 13 [U.S.—Western Union Telegraph Co. v. Industrial Com'n of Minn.](#), 24 F. Supp. 370 (D. Minn. 1938).
- 14 [U.S.—Western Union Telegraph Co. v. Industrial Com'n of Minn.](#), 24 F. Supp. 370 (D. Minn. 1938).

- 15 U.S.—U.S. ex rel. Auld v. Warden of N.J. State Penitentiary, 187 F.2d 615 (3d Cir. 1951); Pebley v. Knotts, 95 F. Supp. 283 (N.D. W. Va. 1951).
- 16 U.S.—In re Mahon, 34 F. 525 (D. Ky. 1888), *aff'd*, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888); Pebley v. Knotts, 95 F. Supp. 283 (N.D. W. Va. 1951).
- 17 U.S.—State of Missouri v. Lewis, 101 U.S. 22, 25 L. Ed. 989, 1879 WL 16647 (1879).
Ill.—Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955).
- 18 U.S.—Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Hysler v. State of Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1942).
Colo.—People ex rel. Juhan v. District Court for Jefferson County, 165 Colo. 253, 439 P.2d 741 (1968).
- 19 U.S.—Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Hysler v. State of Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1942).

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16C C.J.S. Constitutional Law § 1833

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1833. Due process under Fourteenth Amendment as applied to subordinate political entities and other political entities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3935, 3937 to 3940

Subordinate political entities, as creatures of a state, may not challenge state action as violating the entities' rights under the Due Process Clause of the Fourteenth Amendment.

Subordinate political entities, as creatures of a state, may not challenge state action as violating the entities' rights under the Due Process Clause of the Fourteenth Amendment.¹

The Fourteenth Amendment does not apply to the District of Columbia² because it is not a state.³

An Indian tribe is not a "state" within the meaning of the Fourteenth Amendment,⁴ and thus, the Fourteenth Amendment may not be invoked against an Indian tribe⁵ or its members.⁶

Puerto Rico is subject to the Due Process Clause of the Fourteenth Amendments.⁷

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Footnotes

- 1 Cal.—[Board of Administration v. Wilson](#), 57 Cal. App. 4th 967, 67 Cal. Rptr. 2d 477 (3d Dist. 1997).
County
Neb.—[Schropp Industries, Inc. v. Washington County Attorney's Office](#), 281 Neb. 152, 794 N.W.2d 685 (2011).
- 2 U.S.—[Bolling v. Sharpe](#), 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), opinion supplemented on other grounds, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955); [Dano Resource Recovery, Inc. v. District of Columbia](#), 923 F. Supp. 249 (D.D.C. 1996).
D.C.—[Olafisoye v. U.S.](#), 857 A.2d 1078 (D.C. 2004).
- 3 U.S.—[District of Columbia v. Carter](#), 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973).
D.C.—[Hughes v. A.H. Robins Co., Inc.](#), 490 A.2d 1140 (D.C. 1985).
- 4 U.S.—[Dodge v. Nakai](#), 298 F. Supp. 17 (D. Ariz. 1968).
- 5 U.S.—[Boudman v. Aroostook Band of Micmac Indians](#), 54 F. Supp. 2d 44 (D. Me. 1999).
- 6 Wash.—[Suarez v. Newquist](#), 70 Wash. App. 827, 855 P.2d 1200 (Div. 3 1993).
- 7 U.S.—[Calero-Toledo v. Pearson Yacht Leasing Co.](#), 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974); [Gonzalez-Mercado v. Municipality of Guaynabo](#), 206 F. Supp. 2d 257 (D.P.R. 2002); [Morales Feliciano v. Rossello Gonzalez](#), 13 F. Supp. 2d 151 (D.P.R. 1998).

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16C C.J.S. Constitutional Law § 1834

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1834. Due process under Fourteenth Amendment as applied to individuals

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941, 3942, 3944

The due process guaranty of the Fourteenth Amendment does not apply to the acts or conduct of private persons or entities, unless such private persons or entities are acting under color of state authority or law.

The due process guaranty of the Fourteenth Amendment does not apply to the acts or conduct of private persons or entities,¹ however discriminatory or wrongful,² unless such private persons or entities are acting under color of state authority or law.³ The Due Process Clause of the Fourteenth Amendment does not apply to private conduct unless state action can be found.⁴

CUMULATIVE SUPPLEMENT

Cases:

Fifth Amendment does not offer immigrants a right to effective assistance; the Due Process Clause constrains the federal government, not private citizens. [U.S. Const. Amend. 5](#). [Al-Saka v. Sessions](#), 904 F.3d 427 (6th Cir. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418, 4 Ed. Law Rep. 999 (1982); *Guerrero v. Bensalem Racing Ass'n, Inc.*, 25 F. Supp. 3d 573 (E.D. Pa. 2014).
Idaho—*State v. Gilpin*, 132 Idaho 643, 977 P.2d 905 (Ct. App. 1999).
Property owner who engages in self-help
U.S.—*GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), cert. denied, 133 S. Ct. 856, 184 L. Ed. 2d 656 (2013).
- 2 U.S.—*Conant v. Wells Fargo Bank, N.A.*, 24 F. Supp. 3d 1 (D.D.C. 2014).
- 3 U.S.—*Slaby v. Fairbridge*, 3 F. Supp. 2d 22 (D.D.C. 1998); *Silkwood v. Kerr-McGee Corp.*, 460 F. Supp. 399 (W.D. Okla. 1978), judgment aff'd, 637 F.2d 743 (10th Cir. 1980); *In re Nutri*Bevco, Inc.*, 117 B.R. 771 (Bankr. S.D. N.Y. 1990).
- 4 Tex.—*Park v. Escalera Ranch Owners' Association, Inc.*, 2015 WL 737424 (Tex. App. Austin 2015).
As to necessity of state action to invoke protection of due process clauses, generally, see § 1839.

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16C C.J.S. Constitutional Law § 1835

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1835. Enforcement Clause of Fourteenth Amendment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4858

Under the Enforcement Clause of the Fourteenth Amendment, Congress may "enforce," by "appropriate legislation," the constitutional guaranty that no state shall deprive any person of life, liberty, or property without due process of law.

Under the Enforcement Clause of the Fourteenth Amendment, Congress may "enforce," by "appropriate legislation," the constitutional guaranty that no state shall deprive any person of life, liberty, or property without due process of law.¹ Legislation enacted by Congress, pursuant to the Enforcement Clause of the Fourteenth Amendment to remedy or deter violations of due process, may prohibit conduct that does not itself constitute a constitutional violation.²

CUMULATIVE SUPPLEMENT

Cases:

To decide whether congressional action falls within its authority under the Fourteenth Amendment to enforce the commands of the Due Process Clause, courts are to consider the constitutional problem Congress faced both the nature and the extent of

state conduct violating the Fourteenth Amendment; that assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. [U.S. Const. Amend. 14](#). [Allen v. Cooper](#), 140 S. Ct. 994 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[U.S. v. Morrison](#), 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
- 2 U.S.—[Jones v. Pennsylvania](#), 164 F. Supp. 2d 490 (E.D. Pa. 2001).

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16C C.J.S. Constitutional Law § 1836

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1836. Relationship of due process to equal protection guaranty

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3861

The separate clauses of the Fourteenth Amendment guaranteeing due process of law and equal protection of the laws refer to separate rights, the purpose being to require equal protection as well as due process.

The separate clauses of the Fourteenth Amendment guarantying due process of law and equal protection of the laws refer to separate rights,¹ the purpose being to require equal protection as well as due process.² It has been pointed out, however, that "due process" is not of greater stature than "equal protection" and thus available to a larger class of persons; to the contrary, it has been held that each aspect of the Fourteenth Amendment reflects an elementary limitation on state power.³

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Footnotes

- ¹ Minn.—[State v. Northwestern Preparatory School](#), 228 Minn. 363, 37 N.W.2d 370 (1949).
As to equal protection of the laws, generally, see §§ [1256](#) to [1609](#).
- ² Minn.—[George Benz Sons Inc. v. Ericson](#), 227 Minn. 1, 34 N.W.2d 725 (1948).

3

U.S.—[Plyler v. Doe](#), 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786, 4 Ed. Law Rep. 953 (1982).

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16C C.J.S. Constitutional Law § 1837

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1837. Incorporation of Bill of Rights into Due Process Clause of Fourteenth Amendment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3849 to 3860

The Due Process Clause of the Fourteenth Amendment to the United States Constitution incorporates many or most of the specific protections defined in the Bill of Rights, which originally restricted only the federal government. These incorporated provisions thus apply to the states as well as the federal government.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution incorporates many or most of the specific protections defined in the Bill of Rights,¹ which originally restricted only the federal government.² These incorporated provisions thus apply to the states as well as the federal government.³

Once it is decided that a particular Bill of Rights guaranty is fundamental to the American scheme of justice, the same constitutional standards apply against both the state and federal governments.⁴ A Bill of Rights provision that is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment.⁵ "Incorporation" of a Bill of Rights provision into the Fourteenth Amendment as a limitation upon state activities is a determination that the provision is a fundamental right essential to a fair trial.⁶

Additional protected rights.

In addition to the specific freedoms protected by the Bill of Rights,⁷ "liberty" specially protected by the Due Process Clause of the Fourteenth Amendment includes, among other things, the rights to marry, have children, direct the education and upbringing of one's children, enjoy marital privacy, use contraception, preserve one's bodily integrity, and choose abortion.⁸

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Footnotes

- 1 U.S.—[Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); [Charles v. Front Royal Volunteer Fire and Rescue Dept., Inc.](#), 21 F. Supp. 3d 620 (W.D. Va. 2014).
Cal.—[People v. Scott](#), 64 Cal. App. 4th 550, 75 Cal. Rptr. 2d 315 (2d Dist. 1998).
Tex.—[In re G.C.](#), 66 S.W.3d 517 (Tex. App. Fort Worth 2002).
- 2 U.S.—[Flaskamp v. Dearborn Public Schools](#), 385 F.3d 935, 192 Ed. Law Rep. 359, 2004 FED App. 0343P (6th Cir. 2004).
- 3 U.S.—[Thompson v. Colorado](#), 278 F.3d 1020 (10th Cir. 2001), as amended on denial of reh'g and reh'g en banc, (Oct. 9, 2001).
- 4 U.S.—[Benton v. Maryland](#), 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).
- 5 U.S.—[Washington v. Texas](#), 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).
- 6 U.S.—[U. S. ex rel. Morford v. Hocker](#), 268 F. Supp. 864 (D. Nev. 1967), judgment aff'd, 394 F.2d 169 (9th Cir. 1968).
- 7 [§ 1838](#).
- 8 [§ 1889](#).

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16C C.J.S. Constitutional Law § 1838

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

C. Constitutional Guaranty

3. Fourteenth Amendment

§ 1838. Incorporation of Bill of Rights into Due Process Clause of Fourteenth Amendment—Particular provisions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3849 to 3860

The Due Process Clause has been held to protect rights covered by the First, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments. On the other hand, the Second and the Seventh Amendments have not been incorporated into the Fourteenth Amendment.

The Due Process Clause has been held to protect rights covered by the First,¹ Second,² Third,³ Fourth,⁴ Fifth,⁵ Sixth,⁶ Eighth,⁷ and Ninth⁸ Amendments. On the other hand, the Seventh Amendment has not been incorporated into the Fourteenth Amendment.⁹

Rights asserted directly under Fourteenth Amendment.

Rights guaranteed by the Fifth Amendment are not incorporated into the Fourteenth Amendment where such rights, if they exist, can be asserted directly under the Fourteenth Amendment.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

By operation of the Fourteenth Amendment, the right to a jury trial in criminal cases is applicable to the States. [U.S.C.A. Const. Art. 3, § 2, cl. 3](#); [U.S.C.A. Const.Amend. 6, 14](#). [Pena-Rodriguez v. Colorado](#), 137 S. Ct. 855 (2017).

Under the more-specific-provision rule, if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. [U.S. Const. Amend. 4, 8, 14](#). [DeLade v. Cargan](#), 972 F.3d 207 (3d Cir. 2020).

United States Constitution's Fifth Amendment Clause applies to the States through the Fourteenth Amendment's Due Process Clause. [U.S.C.A. Const.Amend. 5, 14](#). [State v. Kasperek](#), 2016 MT 163, 375 P.3d 372 (Mont. 2016).

The Seventh Amendment to the United States Constitution is not incorporated into the Fourteenth Amendment and is therefore not applicable to the states. [U.S. Const. Amend. 7, 14](#). [Orientale v. Jennings](#), 239 N.J. 569, 218 A.3d 806 (2019).

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Footnotes

- 1

[U.S.—Zorach v. Clauson](#), 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952); [Freedom From Religion Foundation v. Hanover School Dist.](#), 626 F.3d 1, 262 Ed. Law Rep. 106 (1st Cir. 2010); [Conlon v. InterVarsity Christian Fellowship](#), 777 F.3d 829 (6th Cir. 2015); [Diadenko v. Folino](#), 741 F.3d 751, 301 Ed. Law Rep. 18 (7th Cir. 2013); [Farneski v. County of Hunterdon](#), 916 F. Supp. 2d 573 (D.N.J. 2013).

[Md.—Belton v. State](#), 152 Md. App. 623, 833 A.2d 54 (2003).

[N.M.—Mocek v. City of Albuquerque](#), 3 F. Supp. 3d 1002 (D.N.M. 2014).

[Ohio—Greer-Burger v. Temesi](#), 116 Ohio St. 3d 324, 2007-Ohio-6442, 879 N.E.2d 174 (2007).

[Pa.—In re Stevenson](#), 615 Pa. 50, 40 A.3d 1212 (2012).

Due process protections from governmental intrusion as applicable to various aspects of freedom of speech and press and related rights, see § 2144.

City ordinances

First Amendment limitations on governmental authority are applicable to city ordinances through the Fourteenth Amendment.

[Mich.—Outdoor Systems, Inc. v. City of Clawson](#), 262 Mich. App. 716, 686 N.W.2d 815 (2004).

Provision of substantive meaning

The relevance of the First Amendment in actions involving state conduct is that it provides substantive meaning to the provisions of the Fourteenth Amendment insofar as it is incorporated into the Due Process Clause.

[U.S.—Flesch v. Eastern Pennsylvania Psychiatric Institute](#), 434 F. Supp. 963 (E.D. Pa. 1977).
- 2

[U.S.—McDonald v. City of Chicago, Ill.](#), 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); [Silvester v. Harris](#), 41 F. Supp. 3d 927 (E.D. Cal. 2014); [San Francisco Veteran Police Officers Association v. City and County of San Francisco](#), 18 F. Supp. 3d 997 (N.D. Cal. 2014); [Gowder v. City of Chicago](#), 923 F. Supp. 2d 1110 (N.D. Ill. 2012).

[Or.—State v. Christian](#), 249 Or. App. 1, 274 P.3d 262 (2012), decision *aff'd*, 354 Or. 22, 307 P.3d 429 (2013).
- 3

[U.S.—Engblom v. Carey](#), 677 F.2d 957 (2d Cir. 1982).
- 4

[U.S.—Bailey v. U.S.](#), 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013); [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); [Adams v. Springmeyer](#), 17 F. Supp. 3d 478 (W.D. Pa. 2014).

[Iowa—State v. Carter](#), 696 N.W.2d 31 (Iowa 2005).

Md.—*State v. Green*, 375 Md. 595, 826 A.2d 486 (2003).

Tenn.—*State v. Nicholson*, 188 S.W.3d 649 (Tenn. 2006).

Wis.—*State v. Sobczak*, 2013 WI 52, 347 Wis. 2d 724, 833 N.W.2d 59 (2013), cert. denied, 134 S. Ct. 626, 187 L. Ed. 2d 406 (2013).

As to due process in connection with the validity of searches and seizures, generally, see §§ 1622 to 1627.

As to exclusion from criminal trials of evidence illegally seized, generally, see § 1663.

5 U.S.—*Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Duncan v. State of La.*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Davis v. Self*, 960 F. Supp. 2d 1276 (N.D. Ala. 2013), aff'd, 547 Fed. Appx. 927 (11th Cir. 2013).

Ala.—*Ex parte Ebbers*, 871 So. 2d 776 (Ala. 2003).

Iowa—*Kingsway Cathedral v. Iowa Dept. Of Transp.*, 711 N.W.2d 6 (Iowa 2006).

Tex.—*Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468 (Tex. 2012), cert. denied, 133 S. Ct. 1999, 185 L. Ed. 2d 867 (2013).

As to double jeopardy prohibition of the Fifth Amendment applicable to states through the Due Process Clause of Fourteenth Amendment, see § 1620.

As to Fifth Amendment privilege against self-incrimination applicable to states through Fourteenth Amendment, see § 1666.

Grand jury

The Fifth Amendment's grand jury provision does not apply to the states through the Fourteenth Amendment.

Kan.—*State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008).

6 U.S.—*Duncan v. State of La.*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Anderson v. Secretary, Fla. Dept. of Corrections*, 752 F.3d 881 (11th Cir. 2014), cert. denied, 135 S. Ct. 1483 (2015).

Idaho—*Hall v. State*, 155 Idaho 610, 315 P.3d 798 (2013).

Iowa—*State v. Biddle*, 652 N.W.2d 191 (Iowa 2002).

Mass.—*Com. v. Beatrice*, 460 Mass. 255, 951 N.E.2d 26 (2011).

Tenn.—*Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008).

As to requirement of Sixth Amendment that accused in criminal prosecution shall have right to assistance of counsel applicable to states by Due Process Clause of the Fourteenth Amendment, see §§ 1680 to 1687.

As to right to speedy trial, provided by Sixth Amendment, applicable to states by Due Process Clause of Fourteenth Amendment, see § 1696.

As to right to trial by jury, provided in Sixth Amendment, applicable to states by Due Process Clause of Fourteenth Amendment, see § 1710.

As to right of accused to public trial, provided by Sixth Amendment, applicable to states by Due Process Clause of Fourteenth Amendment, see § 1701.

As to right of accused to be confronted with witnesses against him or her and to have compulsory process for obtaining witnesses in his or her favor, provided by Sixth Amendment, applicable to states by Due Process Clause of Fourteenth Amendment, see § 1728.

Notice provision of Sixth Amendment

Idaho—*State v. Abdullah*, 2015 WL 856787 (Idaho 2015).

Rights fundamental to scheme of justice

Only those rights guaranteed by the Sixth Amendment that are fundamental to the American scheme of justice or essential to a fair trial apply to the states through the Fourteenth Amendment.

Cal.—*Stevenson v. Lewis*, 384 F.3d 1069 (9th Cir. 2004).

Public trial

A defendant's right to a public trial is guaranteed in all criminal proceedings by the Sixth Amendment, and this right is made applicable to the states through the Fourteenth Amendment.

Conn.—*State v. Molnar*, 79 Conn. App. 91, 829 A.2d 439 (2003), judgment aff'd, 271 Conn. 641, 858 A.2d 767 (2004).

7 U.S.—*Mapes v. Tate*, 388 F.3d 187, 2004 FED App. 0380P (6th Cir. 2004); *Estate of Conner by Conner v. Ambrose*, 990 F. Supp. 606 (N.D. Ind. 1997).

Ind.—*Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968).

As to Eighth Amendment ban on cruel and unusual punishment applicable to states by Due Process Clause of Fourteenth Amendment, see § 1741.

8 U.S.—*Rini v. Zwirn*, 886 F. Supp. 270 (E.D. N.Y. 1995).

- 9 Del.—[Johnson v. State](#), 711 A.2d 18 (Del. 1998).
Ga.—[Nodvin v. State Bar of Georgia](#), 273 Ga. 559, 544 S.E.2d 142 (2001).
Pa.—[Bensinger v. University of Pittsburgh Medical Center](#), 2014 PA Super 174, 98 A.3d 672 (2014).
- 10 U.S.—[Shoemaker v. City of Lock Haven](#), 906 F. Supp. 230 (M.D. Pa. 1995).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Due Process
A.L.R. Index, Fifth Amendment
A.L.R. Index, Fourteenth Amendment
A.L.R. Index, State Action
West's A.L.R. Digest, [Constitutional Law](#) 🔑 3935 to 3945

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1839. General standard as to what constitutes state or federal action

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3935 to 3942

In general, the protection of the due process clauses can be invoked only when the action complained of constitutes state or federal action. The standards for finding federal action under the Fifth Amendment are the same as those for finding state action under the Fourteenth Amendment.

In general, the protection of the due process clauses can be invoked only when the action complained of constitutes state or federal action.¹ The standards for finding federal action under the Fifth Amendment are the same as those for finding state action under the Fourteenth Amendment.²

While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established,³ and the principle of state action may be easily stated,⁴ the question whether particular conduct is "private" on the one hand, or "state action," on the other, frequently admits of no easy answer.⁵ The word "state" is used in its generic sense; the doctrine governs liability for both state and federal government.⁶

"State action" may, with regard to applicability of Fourteenth Amendment, result from administrative, regulatory, legislative, and judicial action.⁷ State action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor.⁸

The constitutional due process protections of individual rights and liberties extend only to government actions.⁹ For due process to apply, there must be state action and deprivation of an individual interest of sufficient substance to warrant constitutional protection.¹⁰ The mere existence of a body of property law in a state, whether decisional or statutory, does not suffice as state action under the Fourteenth Amendment.¹¹

The purpose of the state action requirement is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on the State for conduct that it cannot control but also to assure that constitutional standards are invoked when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.¹²

CUMULATIVE SUPPLEMENT

Cases:

The Fourteenth Amendment applies only to state action performed by a person who may fairly be said to be a state actor. U.S.C.A. Const.Amend. 14. *Jarvis v. Village Gun Shop, Inc.*, 805 F.3d 1 (1st Cir. 2015).

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Footnotes

- 1 U.S.—*Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000); *Solis v. Prince George's County*, 153 F. Supp. 2d 793 (D. Md. 2001); *Houston v. U.S.*, 60 Fed. Cl. 507 (2004).
 Colo.—*People v. Ramadan*, 2013 CO 68, 314 P.3d 836 (Colo. 2013).
 Md.—*Toland v. Futagi*, 425 Md. 365, 40 A.3d 1051 (2012).
 Tex.—*Ex parte Spicuzza*, 903 S.W.2d 381 (Tex. App. Houston 1st Dist. 1995), petition for discretionary review refused, (Aug. 23, 1995).
 W. Va.—*Martin v. Hamblet*, 230 W. Va. 183, 737 S.E.2d 80 (2012).
Conduct attributed to or directed by government
 Due process is not violated unless the conduct is attributable to or directed by the government.
 U.S.—*U.S. v. King*, 200 F.3d 1207, 53 Fed. R. Evid. Serv. 950 (9th Cir. 1999).
- 2 U.S.—*Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999); *Frankenberg v. Superior Distributors, Inc.*, 961 F. Supp. 1560 (S.D. Ala. 1997); *Fischer v. Driscoll*, 546 F. Supp. 861, 6 Ed. Law Rep. 545 (E.D. Pa. 1982).
- 3 U.S.—*Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262 (10th Cir. 2002).
- 4 U.S.—*Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 941 F. Supp. 692 (N.D. Ill. 1996).
- 5 U.S.—*Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262 (10th Cir. 2002); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 98 Ed. Law Rep. 639 (10th Cir. 1995); *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 941 F. Supp. 692 (N.D. Ill. 1996).
- 6 U.S.—*Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).
- 7 U.S.—*Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973).

- 8 U.S.—*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999); *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679 (D. Md. 2001), judgment *aff'd*, 313 F.3d 205 (4th Cir. 2002).
- 9 Mo.—*Mottl v. Missouri Lawyer Trust Account Foundation*, 133 S.W.3d 142 (Mo. Ct. App. W.D. 2004).
- 10 Conn.—*MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 872 A.2d 423 (2005).
- 11 Kan.—*Prager v. State, Dept. of Revenue*, 271 Kan. 1, 20 P.3d 39 (2001).
- 12 R.I.—*Gem Plumbing & Heating Co., Inc. v. Rossi*, 867 A.2d 796 (R.I. 2005).
- U.S.—*Jenkins v. Area Cooperative Educ. Services*, 248 F. Supp. 2d 117 (D. Conn. 2003), modified on other grounds on reconsideration, 2004 WL 413267 (D. Conn. 2004).

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16C C.J.S. Constitutional Law § 1840

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1840. State or federal involvement in private conduct

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941, 3942

While the proscriptions of due process ordinarily do not extend to private conduct, in some circumstances, the actions of private citizens or parties can become actions of the state or federal government for purposes of the due process clauses.

While the proscriptions of due process ordinarily do not extend to private conduct,¹ in some circumstances, the actions of private citizens or parties can become actions of the state or federal government for purposes of the due process clauses.²

In deciding whether an entity is public or private, and whether its actions are sufficiently identified with the State to give rise to a due process claim, a court examines the structure of the entity and its relationship to the governmental unit.³ While there is no precise formula for determining whether state action is present in a situation where private conduct abridges individual rights,⁴ the extent and effect of the involvement by the state or federal government in the affairs of a private entity can be measured only by sifting and/or weighing the facts and circumstances,⁵ and the determination of whether or not a private entity's actions can be considered state action is necessarily a case-by-case determination.⁶

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Footnotes

- 1 § 1834.
- 2 U.S.—*De Malherbe v. International Union of Elevator Constructors*, 438 F. Supp. 1121, 25 Fed. R. Serv. 2d 35 (N.D. Cal. 1977).
N.Y.—*Madeline G. v. David R.*, 95 Misc. 2d 273, 407 N.Y.S.2d 414 (Fam. Ct. 1978).
- 3 U.S.—*Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988).
- 4 U.S.—*Anderson by Anderson v. Indiana High School Athletic Ass'n*, 699 F. Supp. 719, 50 Ed. Law Rep. 443 (S.D. Ind. 1988); *Mulvihill v. Julia L. Butterfield Memorial Hospital*, 329 F. Supp. 1020 (S.D. N.Y. 1971).
- 5 U.S.—*Huff v. Notre Dame High School of West Haven*, 456 F. Supp. 1145 (D. Conn. 1978); *Wisch v. Sanford School, Inc.*, 420 F. Supp. 1310 (D. Del. 1976).
Pa.—*Barasch v. Pennsylvania Public Utility Com'n*, 133 Pa. Commw. 285, 576 A.2d 79 (1990), decision aff'd, 529 Pa. 523, 605 A.2d 1198 (1992).
- 6 U.S.—*Newsom v. Vanderbilt University*, 653 F.2d 1100 (6th Cir. 1981).
Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).

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16C C.J.S. Constitutional Law § 1841

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1841. Degree of involvement to constitute state or federal action

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West's Key Number Digest

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Generally, the test of what constitutes "state action" is not merely that of state involvement but rather significant involvement in the challenged activity.

Generally, the test of what constitutes "state action" is not merely that of state involvement¹ but rather significant involvement in the challenged activity.²

A private citizen's conduct may be attributable to the State for due process purposes where the government affirmatively facilitates, encourages, or authorizes the objectionable practice,³ and where a private party is engaged in an alleged due process deprivation at the State's express direction, the actor may well be subject to constitutional limitations.⁴ Private action cannot be converted into state action by the simple device of characterizing a state's inaction as authorization and encouragement.⁵

Direct involvement is not necessary for there to be state or federal action.⁶ Involvement of the State is not required to be either exclusive or direct and sufficient "state action" to invoke the protection of the Fourteenth Amendment may exist even though

participation of the State is peripheral.⁷ The State need not be the direct moving force and the offending action need not be taken by the State directly or its elected or appointed officials.⁸ For state or federal action to exist, however, the state or federal government must be involved not simply with the activity of the private entity alleged to have inflicted the injury but with the offending activity of the private entity.⁹

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Footnotes

- 1 N.Y.—[Sharrock v. Dell Buick-Cadillac, Inc.](#), 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).
 Tex.—[Armenta v. Nussbaum](#), 519 S.W.2d 673 (Tex. Civ. App. Corpus Christi 1975), writ refused n.r.e., (June 11, 1975).
Mere involvement
 Ordinarily, a state's mere involvement in the running of a statute of limitations will not constitute a deprivation of a claimant's constitutional rights to due process.
 Colo.—[In re Estate of Ongaro](#), 998 P.2d 1097 (Colo. 2000).
- 2 Mo.—[Mottl v. Missouri Lawyer Trust Account Foundation](#), 133 S.W.3d 142 (Mo. Ct. App. W.D. 2004).
 N.Y.—[Sharrock v. Dell Buick-Cadillac, Inc.](#), 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).
Extensively regulated industry
 "Significant" involvement of a state with a private party, rendering the State subject to the strictures of due process guarantees, is typically found when state officials in an extensively regulated industry participate and put their weight behind the challenged private act.
 U.S.—[SMI Industries, Inc. v. Lanard & Axilbund, Inc.](#), 481 F. Supp. 459 (E.D. Pa. 1979).
- 3 U.S.—[Jeffries v. Georgia Residential Finance Authority](#), 678 F.2d 919, 34 Fed. R. Serv. 2d 500 (11th Cir. 1982).
- 4 U.S.—[Taylor v. Consolidated Edison Co. of New York, Inc.](#), 552 F.2d 39 (2d Cir. 1977).
- 5 U.S.—[Becnel v. City Stores Co.](#), 675 F.2d 731 (5th Cir. 1982).
- 6 Cal.—[Adams v. Department of Motor Vehicles](#), 11 Cal. 3d 146, 113 Cal. Rptr. 145, 520 P.2d 961, 64 A.L.R.3d 803 (1974).
- 7 N.Y.—[Firestone v. First Dist. Dental Soc.](#), 59 Misc. 2d 362, 299 N.Y.S.2d 551 (Sup 1969).
- 8 N.Y.—[Ryan v. Hofstra University](#), 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup 1971), opinion supplemented, 68 Misc. 2d 890, 328 N.Y.S.2d 339 (Sup 1972).
- 9 U.S.—[New York City Jaycees, Inc. v. United States Jaycees, Inc.](#), 512 F.2d 856 (2d Cir. 1975).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1842. Degree of involvement to constitute state or federal action—Enactment of statute or codification of common law

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West's Key Number Digest, [Constitutional Law](#)  3941

When a statute permits that which has been prohibited by common law, the decisions of private parties can potentially be considered state actions, for purposes of due process analysis.

Direct legislative embodiments of public will, in the form of statutes, can be considered state action for due process purposes, even where the statutes codify the common law, when the consequence of a statute enables private citizens to act in derogation of the Constitution.¹ When a statute permits that which has been prohibited by common law, the decisions of private parties can potentially be considered state actions, for purposes of due process analysis.² Due process rights attach when an actor deprives a person of property or liberty without notice or hearing pursuant to a state law that substantially modifies private common-law rights.³ The presence or lack of common-law origin for conduct that is codified is only one of the facts to be weighed in determining whether conduct regulated by a statute is state action, subject to a due process guaranty and is not per se dispositive of the issue.⁴

The mere enactment into statutory form of what has been an accepted private practice for many years does not result in state action.⁵ Passive involvement, by the mere enactment of a statute that permits private conduct, with no further significant participation by the State, does not constitute state action for due process purposes.⁶ Although the mere enactment of a self-executing nonclaim statute is state action, a state's limited involvement in such instances falls short of constituting the type of state action required to implicate the due process protections.⁷

Codification of the common law does not amount to state action "encouraging" forms of private conduct, for purposes of due process, simply because of the fact of the legislation.⁸ Thus, a statute that neither adds new rights nor permits private conduct prohibited under the common law, does not raise that conduct to the level of state action for due process purposes,⁹ and the mere statutory regulation of a power recognized at common law, as opposed to the creation of a power by statute, is not sufficient state involvement to justify a finding of state action for due process purposes.¹⁰

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Footnotes

- 1 U.S.—*Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974).
- 2 Cal.—*King v. Meese*, 43 Cal. 3d 1217, 240 Cal. Rptr. 829, 743 P.2d 889 (1987).
- 3 U.S.—*Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39 (2d Cir. 1977).
- 4 U.S.—*Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Ariz. 1976).
- 5 N.J.—*State v. Drouman*, 143 N.J. Super. 322, 362 A.2d 1304 (Law Div. 1976).
- 6 Ark.—*Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007).
Ga.—*Evans v. Harley Hotels, Inc.*, 253 Ga. 53, 315 S.E.2d 896 (1984).
Ill.—*Hill v. PS Illinois Trust*, 368 Ill. App. 3d 310, 305 Ill. Dec. 755, 856 N.E.2d 560 (1st Dist. 2006).
Wash.—*Kennebec, Inc. v. Bank of the West*, 88 Wash. 2d 718, 565 P.2d 812 (1977).
- 7 Colo.—*In re Estate of Ongaro*, 973 P.2d 660 (Colo. App. 1998), judgment aff'd, 998 P.2d 1097 (Colo. 2000).
Wis.—*Estate of Wolff v. Town Bd. of Town of Weston*, 156 Wis. 2d 588, 457 N.W.2d 510 (Ct. App. 1990).
Statute of limitations
U.S.—*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).
Mo.—*Consolidated Grain & Barge, Co. v. Hobbs*, 397 S.W.3d 467 (Mo. Ct. App. S.D. 2013), reh'g and/or transfer denied, (Feb. 20, 2013) and transfer denied, (Apr. 30, 2013).
- 8 N.J.—*King v. South Jersey Nat. Bank*, 66 N.J. 161, 330 A.2d 1, 15 U.C.C. Rep. Serv. 969, 75 A.L.R.3d 1030 (1974).
- 9 Cal.—*Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266 (1974).
- 10 U.S.—*Donahoo v. Household Finance Corp.*, 472 F. Supp. 353 (E.D. Mich. 1979).

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16C C.J.S. Constitutional Law § 1843

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1843. Close nexus to establish state or federal action

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941, 3942

As a general rule, in order to find state action under the Fourteenth Amendment or federal action under the Fifth Amendment, there must exist a sufficiently close nexus between the state or federal government and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the state or federal government itself.

As a general rule, in order to find state action under the Fourteenth Amendment,¹ or federal action under the Fifth Amendment,² there must exist a sufficiently close nexus between the state or federal government and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the state or federal government itself. The purpose of the close nexus requirement, in order to find state action under the Fourteenth Amendment, is to assure that constitutional standards are invoked only when it can be said that a state is responsible for specific conduct of which complaint is made.³

Whether there exists a close nexus between a state and the challenged action of an entity regulated by the State, as required for the entity to be a state actor for purposes of the Fourteenth Amendment, depends on whether the State exercises coercive power or provides such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government.⁴

The mere approval of or acquiescence in initiatives of a private party is not sufficient to justify holding state responsible for such initiatives under Fourteenth Amendment;⁵ a state is "significantly involved" only when it has commanded a particular result or reserved to itself the power to determine that result.⁶ The impetus for activity challenged as violative of due process need not originate with the State; state action may be found if a state simply enforces activity which originates privately, though the nexus must exist between governmental involvement and the particular activity being challenged or evidence must demonstrate that the State has become a joint participant in that activity.⁷

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Footnotes

- 1 U.S.—*Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 151 Ed. Law Rep. 18 (2001); *Whitney v. Window to the World Communications, Inc.*, 837 F. Supp. 2d 854 (N.D. Ill. 2011); *Jenkins v. Gaylord Entertainment Co.*, 840 F. Supp. 2d 873 (D. Md. 2012); *Woodward v. Office of Dist. Atty.*, 689 F. Supp. 2d 655 (S.D. N.Y. 2010).
Ill.—*In re Marriage of Braundmeier*, 201 Ill. App. 3d 14, 146 Ill. Dec. 842, 558 N.E.2d 805 (5th Dist. 1990).
Mich.—*People v. Farrow*, 183 Mich. App. 436, 455 N.W.2d 325 (1990).
N.J.—*Elias v. Educational Com'n for Foreign Medical Graduates (ECFMG)*, 2010 WL 4340640 (N.J. Super. Ct. App. Div. 2010).
Tex.—*Park v. Escalera Ranch Owners' Association, Inc.*, 2015 WL 737424 (Tex. App. Austin 2015).
- 2 U.S.—*Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229 (8th Cir. 1980); *Whitney v. Window to the World Communications, Inc.*, 837 F. Supp. 2d 854 (N.D. Ill. 2011); *In re Kjeldahl*, 52 B.R. 916 (D. Minn. 1985); *Fischer v. Driscoll*, 546 F. Supp. 861, 6 Ed. Law Rep. 545 (E.D. Pa. 1982).
- 3 U.S.—*Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); *Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
Fla.—*Gassner v. Bechtel Const.*, 702 So. 2d 548 (Fla. 1st DCA 1997).
- 4 U.S.—*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999); *American Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 75 F.3d 1401 (9th Cir. 1996).
- 5 U.S.—*Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); *Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
- 6 Ill.—*In re Marriage of Braundmeier*, 201 Ill. App. 3d 14, 146 Ill. Dec. 842, 558 N.E.2d 805 (5th Dist. 1990).
- 7 Ind.—*In re Marriage of Stariha*, 509 N.E.2d 1117 (Ind. Ct. App. 1987).

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16C C.J.S. Constitutional Law § 1844

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1844. Symbiotic relationship with private party to establish state or federal action

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941, 3942

In order to find the requisite state or federal action, there must exist the kind of symbiotic relationship between a private party and the state or federal government in which the state or federal government has so far insinuated itself into a position of interdependence that it is a joint participant in the challenged activity.

Where a private actor and the government can be said to be in a symbiotic relationship, the private actor will be subject to Fifth or Fourteenth Amendment constraints.¹ In order to find the requisite state or federal action, there must exist the kind of symbiotic relationship between a private party and the state or federal government in which the state or federal government has so far insinuated itself into a position of interdependence that it is a joint participant in the challenged activity;² the court examines the relationship between the government and the alleged wrongdoer to discern whether there is a great degree of interdependence between the two.³

Under the symbiotic relationship test, state regulation is not enough to render private institutions "state actors" for Fourteenth Amendment purposes even if the regulation is pervasive, extensive, and detailed.⁴

For purposes of determining whether an alleged wrongdoer is a state actor for Fourteenth Amendment purposes, the "close nexus test" differs from the "symbiotic relationship test" in that the former focuses on the connection between the State and the specific conduct that allegedly violates the plaintiff's civil rights whereas the latter focuses on the entire relationship between the State and the defendants.⁵

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Footnotes

- 1 U.S.—*Giannattasio v. Stamford Youth Hockey Ass'n, Inc.*, 621 F. Supp. 825 (D. Conn. 1985); *Anast v. Commonwealth Apartments*, 956 F. Supp. 792 (N.D. Ill. 1997).
- 2 U.S.—*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
Minn.—*In re Molnar*, 720 N.W.2d 604 (Minn. Ct. App. 2006).
N.H.—*Jerry's Sport Center, Inc. v. Novick*, 122 N.H. 636, 448 A.2d 404 (1982).
- 3 U.S.—*Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
- 4 U.S.—*Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
As to subjection to state regulation, generally, see §§ 1847 to 1849 et seq.
- 5 U.S.—*Klavan v. Crozer-Chester Medical Center*, 60 F. Supp. 2d 436 (E.D. Pa. 1999).
As to close nexus test, generally, see § 1843.

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16C C.J.S. Constitutional Law § 1845

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1845. Traditional exclusive prerogative, or public function, of state

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3941, 3942

If a private entity exercises powers that are traditionally the exclusive prerogative of the State, the state action requirement is satisfied.

If a private entity exercises powers that are traditionally the exclusive prerogative of the State, the state action requirement is satisfied.¹ In other words, a private entity engages in state action where it performs an exclusively and traditionally public function.² Thus, state or federal action may be found to be present where there is a private performance of a government or public function.³ Tolerance of the private performance of a public function is indicative but not determinative of the existence of state action.⁴

While state action, implicating provisions of the federal and state constitutions, is present when the government delegates to the private sector functions that are traditionally the exclusive prerogative of the State,⁵ delegation of a state function to a private entity does not necessarily make the actions of that entity state action for the purposes of due process.⁶ Delegation of a public function to a private citizen is indicative but not determinative of the existence of state action.⁷

The "public function" doctrine applies only to those services which are so clearly governmental in nature that the State cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency,⁸ and the service involved must not only be one which is traditionally the exclusive prerogative of the State, but it must in addition be one that the State itself is under an affirmative duty to provide.⁹

Actions of regulated businesses providing arguably essential goods and services "affected with a public interest," are not, absent more, actions of the State for purposes of the Due Process Clause.¹⁰ Thus, the fact that a private entity performs a function that serves the public does not make its acts "state action,"¹¹ and an allegation that an otherwise private entity has a public purpose does not make it a public entity.¹²

The operation of a private academic institution, even when it receives public grants, does not perform a public function, so as to bring it within the exception to the rule that only state actors may be liable for Fourteenth Amendment violations.¹³ Even at the high school level, education is not a traditionally exclusive public function as would allow actions of private actors providing educational services to be considered state action and implicate provisions of federal and state constitutions.¹⁴

Monopoly status.

In general, the monopoly status of an otherwise private entity is not determinative in considering whether its challenged activity is state action for due process purposes.¹⁵

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Footnotes

- 1 U.S.—Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); Johnson v. Cullen, 925 F. Supp. 244 (D. Del. 1996); Fleming v. Workers' Compensation Com'n of Com. of Va., 878 F. Supp. 852 (E.D. Va. 1995), *aff'd*, 78 F.3d 578 (4th Cir. 1996).
- 2 U.S.—Logiodice v. Trustees of Maine Cent. Institute, 135 F. Supp. 2d 199, 152 Ed. Law Rep. 681 (D. Me. 2001); Melville v. Town of Adams, 9 F. Supp. 3d 77 (D. Mass. 2014).
- 3 U.S.—Baldwin v. Pilgrim Nuclear Power Station, 529 F. Supp. 2d 204 (D. Mass. 2008); Fischer v. Driscoll, 546 F. Supp. 861, 6 Ed. Law Rep. 545 (E.D. Pa. 1982); Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 536 F. Supp. 1065 (E.D. Pa. 1982).
- 4 U.S.—Jacobs v. Huie, 447 F. Supp. 478 (N.D. Tex. 1976).
- 5 U.S.—Cooper v. U.S. Postal Service, 577 F.3d 479 (2d Cir. 2009); Tynecki v. Tufts University School of Dental Medicine, 875 F. Supp. 26, 97 Ed. Law Rep. 1027 (D. Mass. 1994); Freeman v. City of Hackensack, 200 F. Supp. 2d 458 (D.N.J. 2002); Tewksbury v. Dowling, 169 F. Supp. 2d 103 (E.D. N.Y. 2001).
- 6 U.S.—Gray v. Project More, Inc., 469 F. Supp. 621 (D. Conn. 1979), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).
- 7 U.S.—Jacobs v. Huie, 447 F. Supp. 478 (N.D. Tex. 1976).
Factor indicating fairness of attribution of private actor's acts to state
 U.S.—Simms v. District of Columbia, 699 F. Supp. 2d 217 (D.D.C. 2010).
- 8 U.S.—New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975).
- 9 U.S.—New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975).
- 10 U.S.—Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); Doyle v. Unicare Health Services, Inc., Aurora Center, 399 F. Supp. 69 (N.D. Ill. 1975), *aff'd*, 541 F.2d 283 (7th Cir. 1976).
- 11 U.S.—Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418, 4 Ed. Law Rep. 999 (1982).
- 12 Fla.—Moles v. White, 336 So. 2d 427 (Fla. 2d DCA 1976).
- 13 U.S.—Boateng v. Inter American University, 190 F.R.D. 29 (D.P.R. 1999).

- 14 U.S.—*Tynecki v. Tufts University School of Dental Medicine*, 875 F. Supp. 26, 97 Ed. Law Rep. 1027 (D. Mass. 1994).
- 15 U.S.—*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).
Mont.—*Ham v. Holy Rosary Hospital*, 165 Mont. 369, 529 P.2d 361 (1974).

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16C C.J.S. Constitutional Law § 1846

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

1. Basic Principles

§ 1846. Entwinement with government actions or policies

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West's Key Number Digest

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A challenged activity may be considered state action when it is entwined with government policies or when government is entwined in its management or control.

Conduct that is private may become so entwined with governmental actions or policies as to become subject to the constitutional limitations placed upon state or federal action.¹ A challenged activity may be considered state action when it is entwined with government policies or when government is entwined in its management or control.²

When private party becomes too closely intertwined with governmental authority, it may appropriately be enjoined for constitutional violations since difficulty of separating private from governmental action for remedial purposes would often preclude any effective relief.³

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Footnotes

- 1 U.S.—*Logiodice v. Trustees of Maine Cent. Institute*, 296 F.3d 22, 167 Ed. Law Rep. 85 (1st Cir. 2002); *Melville v. Town of Adams*, 9 F. Supp. 3d 77 (D. Mass. 2014); *Baldwin v. Pilgrim Nuclear Power Station*, 529 F. Supp. 2d 204 (D. Mass. 2008).
Cal.—*Anchor Pacifica Management Co. v. Green*, 205 Cal. App. 4th 232, 140 Cal. Rptr. 3d 524 (2d Dist. 2012).
Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
N.Y.—*Carnegie Hall Corp. v. Niffenegger*, 18 Misc. 3d 490, 852 N.Y.S.2d 663 (N.Y. City Civ. Ct. 2007).
City landlord entwined with conduct of lease program
City landlord under transitory tenant interim lease program was sufficiently entwined with conduct of program to create significant and meaningful governmental participation and to trigger due process guarantees over eviction by tenant association which managed building; city oversaw association's activities and operation, monitored building management skills, set initial rents, approved subsequent rent increases, and approved commencement of holdover proceedings.
N.Y.—*157 West 123rd Street Tenants Assoc. v. Hickson*, 142 Misc. 2d 984, 542 N.Y.S.2d 900 (App. Term 1989).
- 2 U.S.—*Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 151 Ed. Law Rep. 18 (2001); *Smith v. Detroit Entertainment L.L.C.*, 338 F. Supp. 2d 775 (E.D. Mich. 2004); *Freeman v. City of Hackensack*, 200 F. Supp. 2d 458 (D.N.J. 2002).
- 3 U.S.—*Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, Connecticut*, 514 F.2d 285 (2d Cir. 1975).

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16C C.J.S. Constitutional Law § 1847

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

2. Subjection to Regulation; Receipt of State or Federal Funds

§ 1847. State or federal action based on regulation or receipt of government funds, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941

The mere fact that a business is subject to state or federal regulation does not by itself convert its actions into that of the state or federal government for the purposes of due process, and the mere receipt of government funds is not sufficient to make the challenged action of a private entity state or federal action for purposes of the due process guarantees.

The mere fact that a business is subject to state or federal regulation does not by itself convert its actions into that of the state or federal government for the purposes of due process,¹ nor does the fact that the regulation is extensive and detailed,² or that the private entity is subject to licensing requirements.³ State regulation of what is an essentially private contractual arrangement does not turn that particular area into "state action,"⁴ and state action is not created by the change from one form of regulation to another.⁵

It is not the mere fact of state regulation, but the character of the regulation, that may be significant for Fourteenth Amendment purposes.⁶ In order for a regulating scheme, adopted by a state and implemented by an otherwise private entity, to convert private action into state action the scheme must somehow encourage, aid, or assist a private party to violate the rights of the plaintiff.⁷

Generally, the mere receipt of government funds is not sufficient to make the challenged action of a private entity state or federal action for purposes of the due process guarantees,⁸ as where an otherwise private entity receives federal financial assistance or funds,⁹ or state financial or other support, without more.¹⁰

Although a private employer, which serves persons with mental disabilities, is subject to state and local regulation and funding, its action in discharging employee did not constitute "state action" necessary for employee to invoke due process protections.¹¹

State action is present in the denial of funding to a gay and lesbian student association by a student senate at a public university where the university administrator has the final say as to funding decisions through his or her power to hear appeals.¹²

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Footnotes

- 1 U.S.—*Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); *Whitney v. Window to the World Communications, Inc.*, 837 F. Supp. 2d 854 (N.D. Ill. 2011).
Md.—*Wassif v. North Arundel Hosp. Ass'n, Inc.*, 85 Md. App. 71, 582 A.2d 269 (1990).
Minn.—*In re Molnar*, 720 N.W.2d 604 (Minn. Ct. App. 2006).
Wyo.—*Pete Lien & Sons, Inc. v. Ellsworth Peck Const. Co.*, 896 P.2d 761 (Wyo. 1995).
Interdependence
For the application of due process, a regulation is not enough to make a private entity and a government agency interdependent.
U.S.—*Heiskala v. Johnson Space Center Federal Credit Union*, 474 F. Supp. 448 (S.D. Tex. 1979).
Casinos
State regulation and authorization of casino activities did not transform casinos into state actors.
U.S.—*Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173 (3d Cir. 2000).
- 2 U.S.—*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).
Md.—*Wassif v. North Arundel Hosp. Ass'n, Inc.*, 85 Md. App. 71, 582 A.2d 269 (1990).
- 3 U.S.—*Blouin v. Loyola University*, 506 F.2d 20 (5th Cir. 1975); *Lemmons v. Tranbrow*, 425 F. Supp. 496 (E.D. Tenn. 1976).
Ill.—*Jain v. Northwest Community Hospital*, 67 Ill. App. 3d 420, 24 Ill. Dec. 341, 385 N.E.2d 108 (1st Dist. 1978).
- 4 U.S.—*Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Ariz. 1976).
- 5 U.S.—*Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Ariz. 1976).
- 6 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
- 7 U.S.—*Hobbins v. Methodist Hospital of Madison*, 420 F. Supp. 773 (W.D. Wis. 1976).
- 8 U.S.—*Junior Chamber of Commerce of Kansas City, Mo. v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975); *Johnson v. Southwest Detroit Community Mental Health Services*, 462 F. Supp. 166 (E.D. Mich. 1978).
Fla.—*Moles v. White*, 336 So. 2d 427 (Fla. 2d DCA 1976).
- 9 U.S.—*Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975).
Ill.—*Jain v. Northwest Community Hospital*, 67 Ill. App. 3d 420, 24 Ill. Dec. 341, 385 N.E.2d 108 (1st Dist. 1978).
Okla.—*Beck v. Bacone College*, 1979 OK CIV APP 69, 604 P.2d 876 (Ct. App. Div. 1 1979).
- 10 U.S.—*Madon v. Long Island University, C. W. Post Center*, 518 F. Supp. 246 (E.D. N.Y. 1981), *aff'd*, 681 F.2d 802 (2d Cir. 1981).
Ill.—*Jain v. Northwest Community Hospital*, 67 Ill. App. 3d 420, 24 Ill. Dec. 341, 385 N.E.2d 108 (1st Dist. 1978).
- 11 N.Y.—*Paolucci v. Adult Retardates Center, Inc.*, 182 A.D.2d 681, 582 N.Y.S.2d 452 (2d Dep't 1992).

12

U.S.—[Gay and Lesbian Students Ass'n v. Gohn](#), 850 F.2d 361, 47 Ed. Law Rep. 500 (8th Cir. 1988).

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16C C.J.S. Constitutional Law § 1848

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

2. Subjection to Regulation; Receipt of State or Federal Funds

§ 1848. State or federal action based on medical care

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941

The mere receipt of government funds for the care of indigent patients, or through the Medicare or Medicaid programs, is not sufficient to make the challenged action of a private entity state or federal action for purposes of the due process guarantees.

The mere receipt of government funds for the care of indigent patients,¹ or through the Medicare or Medicaid programs,² is not sufficient to make the challenged action of a private entity state or federal action for purposes of the due process guarantees. An insurer's decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State for purposes of the Fourteenth Amendment.³

Although there is authority to the contrary,⁴ receipt by an otherwise private hospital of Hill-Burton funds does not constitute the requisite state action,⁵ absent a showing of state action supporting discriminatory activities.⁶

Denial of staff privileges.

Despite a state's regulation of hospitals, there is no state action when a private hospital revokes staff privileges, and thus, no due process protections are required.⁷ The fact that a hospital receives government funding and is subject to government regulation and licensing is insufficient to constitute a hospital's denial of staff privileges to a surgeon state action.⁸

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Footnotes

- 1 U.S.—*Doyle v. Unicare Health Services, Inc., Aurora Center*, 399 F. Supp. 69 (N.D. Ill. 1975), *aff'd*, 541 F.2d 283 (7th Cir. 1976).
Ohio—*Gotsis v. Lorain Community Hospital*, 46 Ohio App. 2d 8, 75 Ohio Op. 2d 18, 345 N.E.2d 641 (9th Dist. Lorain County 1974).
- 2 U.S.—*Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982); *Wagner v. Sheltz*, 471 F. Supp. 903 (D. Conn. 1979); *Doyle v. Unicare Health Services, Inc., Aurora Center*, 399 F. Supp. 69 (N.D. Ill. 1975), *aff'd*, 541 F.2d 283 (7th Cir. 1976).
- 3 U.S.—*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).
- 4 U.S.—*Large v. Reynolds*, 414 F. Supp. 45 (W.D. Va. 1976).
N.J.—*Walsky v. Pascack Valley Hospital*, 145 N.J. Super. 393, 367 A.2d 1204 (Ch. Div. 1976), *judgment aff'd*, 156 N.J. Super. 13, 383 A.2d 154 (App. Div. 1978).
- 5 U.S.—*Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982).
Md.—*Wassif v. North Arundel Hosp. Ass'n, Inc.*, 85 Md. App. 71, 582 A.2d 269 (1990).
- 6 Fla.—*Moles v. White*, 336 So. 2d 427 (Fla. 2d DCA 1976).
- 7 N.Y.—*Ritterband v. Axelrod*, 149 Misc. 2d 135, 562 N.Y.S.2d 605 (Sup 1990).
- 8 U.S.—*Brown v. Our Lady of Lourdes Medical Center*, 767 F. Supp. 618 (D.N.J. 1991), *judgment aff'd*, 961 F.2d 207 (3d Cir. 1992).

Factors insufficient to establish state action

Facts that hospital receives public funds, enjoys tax benefits, is subject to pervasive governmental regulation, has virtual monopoly in its market area, and performs public function are insufficient to establish state action as required for physician, whose hospital admitting privileges are suspended, to state claim for deprivation of property without due process.

U.S.—*Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 7 Fed. R. Serv. 3d 915 (8th Cir. 1987).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

2. Subjection to Regulation; Receipt of State or Federal Funds

§ 1849. State or federal action based on regulation of public utilities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941

The fact that a public utility is subject to considerable state regulation does not by itself support a finding of state action.

The fact that a utility is a public utility subject to considerable state regulation does not by itself support a finding of state action.¹ Thus, the mere fact that a public utility is subject to greater regulation than other private corporations or private individuals does not necessarily imply state action whenever the utility acts.²

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Footnotes

¹ U.S.—*Jemzura v. Public Service Com'n*, 971 F. Supp. 702 (N.D. N.Y. 1997).

² N.J.—*State v. Droutman*, 143 N.J. Super. 322, 362 A.2d 1304 (Law Div. 1976).

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16C C.J.S. Constitutional Law § 1850

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1850. State or federal action based on creditors' remedies, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

State action may be found where a creditor makes use of state procedures with overt, significant assistance of the State. However, private use of state-sanctioned private remedies or procedures does not rise to the level of state action in the context of federal due process analysis in the area of state statutes relating to creditor's remedies.

In general, where the procedures invoked by a creditor involve direct state action, the requirements of due process are applicable,¹ and where a creditor is given authority by the State to unilaterally act on the resolution of legal disputes, his or her exercise of such authority must be delimited by the restraints of due process.² State action may be found where a creditor makes use of state procedures with overt, significant assistance of the State.³

Private use of state-sanctioned private remedies or procedures does not rise to the level of state action in the context of federal due process analysis in the area of state statutes relating to creditor's remedies.⁴ Thus, a remedy devised by private parties and executed without the help of public officials ordinarily does not constitute state action to which the requirements of due process

are applicable.⁵ Furthermore, the enactment of a holder-in-due-course statute, coupled with the necessity of state judicial action for its enforcement, does not constitute state action⁶ where the statute applies without distinction to race, creed, sex, or financial status of the individual.⁷

A legislature's enactment of a statute deeming commercially reasonable a public sale of collateral in which the secured party substantially complies with the specified notice procedures does not constitute state action for the purpose of invoking the protection of the due process guarantees in connection with the private party's disposition of the collateral.⁸

Court-appointed receivers.

The acts of court-appointed receivers are "state action" for due process purposes.⁹

Statute of limitations.

A one-year statute of limitations for filing claims against the estate of a deceased person does not violate due process because it is a self-executing statute of limitations and does not involve sufficient state involvement to implicate due process protection.¹⁰

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Footnotes

- 1 U.S.—[Bonner v. B-W Utilities, Inc.](#), 452 F. Supp. 1295 (W.D. La. 1978).
- 2 U.S.—[Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.](#), 554 F.2d 356, 21 U.C.C. Rep. Serv. 840 (8th Cir. 1977).
- 3 Ark.—[Leonards v. E.A. Martin Machinery Co.](#), 321 Ark. 239, 900 S.W.2d 546 (1995).
State action not shown
 A landowner failed to allege sufficient facts to show that contractor's conduct was fairly attributed to the State of Washington where the contractor brought a lien and foreclosure proceeding against a landowner's property and gave notice to the landowner's son but not the landowner, and the landowner asserted that contractor's foreclosure of a lien against the landowner's property without due process of law was fairly attributable to the State when the deprivation was accomplished with the essential participation of the superior court.
 U.S.—[Kuleana, LLC v. Diversified Wood Recycling, Inc.](#), 2009 WL 2486321 (E.D. Wash. 2009), *aff'd*, 383 Fed. Appx. 601 (9th Cir. 2010).
- 4 Ark.—[Leonards v. E.A. Martin Machinery Co.](#), 321 Ark. 239, 900 S.W.2d 546 (1995).
 Nonjudicial foreclosure, see § 1859.
- 5 U.S.—[SMI Industries, Inc. v. Lanard & Axilbund, Inc.](#), 481 F. Supp. 459 (E.D. Pa. 1979).
- 6 U.S.—[Hardy v. Gissendaner](#), 508 F.2d 1207, 16 U.C.C. Rep. Serv. 607 (5th Cir. 1975).
- 7 U.S.—[Hardy v. Gissendaner](#), 508 F.2d 1207, 16 U.C.C. Rep. Serv. 607 (5th Cir. 1975).
- 8 N.C.—[North Carolina Nat. Bank v. Burnette](#), 297 N.C. 524, 256 S.E.2d 388, 27 U.C.C. Rep. Serv. 867 (1979).
- 9 Ind.—[Bowlby v. NBD Bank](#), 640 N.E.2d 1095 (Ind. Ct. App. 1994).
- 10 Mo.—[Consolidated Grain & Barge, Co. v. Hobbs](#), 397 S.W.3d 467 (Mo. Ct. App. S.D. 2013), *reh'g and/or transfer denied*, (Feb. 20, 2013) and *transfer denied*, (Apr. 30, 2013).

16C C.J.S. Constitutional Law § 1851

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1851. State or federal action based on forfeiture of real estate contracts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

There is no state action in procedures conducted pursuant to a statute covering the forfeiture of real estate contracts.

There is no state action in procedures conducted pursuant to a statute covering the forfeiture of real estate contracts.¹ With respect to a statute pertaining to the forfeiture of a real estate contract, where the State assumes a "neutral" role and, even though a sheriff serves a notice of forfeiture and subsequent notice to quit, there is not sufficient state action in the forfeiture to raise issues of due process.²

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Footnotes

- ¹ U.S.—[Staley Farms, Inc. v. Rueter](#), 662 F.2d 520 (8th Cir. 1981).
² Iowa—[Jensen v. Schreck](#), 275 N.W.2d 374 (Iowa 1979).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1852. State or federal action based on mechanics' lien statutes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

A mechanic's lien statute qualifies as state action substantial enough to implicate the procedural due process protections where government officials provide overt, significant assistance in almost every step of the mechanic's lien process.

A mechanics' lien statute qualifies as state action substantial enough to implicate the procedural due process protections where government officials provide overt, significant assistance in almost every step of the mechanic's lien process.¹

Mechanics' liens that are created, regulated, and enforced by the State involve state action for purposes of the application of the due process clauses,² and where a state is otherwise significantly involved in the imposition of liens created by the recording of mechanics' liens, the actions can be characterized as state actions for constitutional purposes.³

A mechanic's lien statute qualifies as state action substantial enough to implicate the procedural due process protection of the Fourteenth Amendment as well as a state constitution where a local officer records the notices of intention perfecting the lien, a

town official records the notices of lis pendens, a state court clerk has a newspaper advertisement published prior to show-cause hearings, and the court registry holds the cash payment or bond in the event a property owner wishes to discharge the lien.⁴

Where an equipment repair shop asserting its possessory lien on repaired equipment pursuant to a statute, but using no assistance from any state official in so doing, and thus, no state action occurring for the purpose of applying federal due process analysis, the deprivation of an equipment owner's property interest is not protected by the Fourteenth Amendment, and the application of the lien statute does not violate federal due process by not providing the owner with the means of obtaining possession prior to a sale.⁵

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Footnotes

- 1 R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
- 2 Md.—[Barry Properties, Inc. v. Fick Bros. Roofing Co.](#), 277 Md. 15, 353 A.2d 222 (1976).
R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
- 3 Cal.—[Connolly Development, Inc. v. Superior Court](#), 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637 (1976).
R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
- 4 R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
- 5 Ark.—[Leonards v. E.A. Martin Machinery Co.](#), 321 Ark. 239, 900 S.W.2d 546 (1995).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1853. State or federal action based on wage assignment statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

Where a wage assignment statute regulates, rather than creates, an assignment of wages, an execution upon a wage assignment does not involve sufficient state action to trigger the application of the due process clauses.

Although state governmental involvement, for due process purposes, exists in the wage assignment field,¹ the action of a lender, with whom a borrower enters into a wage assignment agreement, in filing the assignment with the borrower's employer does not constitute state action for due process purposes,² where the State is not a partner of the lender,³ the intent of the wage assignment statute is not to encourage wage assignments,⁴ and the statute does not vest the lender with a function traditionally performed by the State.⁵ Similarly, where a wage assignment statute regulates, rather than creates, an assignment of wages, an execution upon a wage assignment does not involve sufficient state action to trigger the application of the due process clauses.⁶

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Footnotes

- 1 N.Y.—Beneficial Finance Co. of New York, Inc. v. Bond, 83 Misc. 2d 9, 372 N.Y.S.2d 374 (Sup 1975).
- 2 U.S.—Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).
- 3 U.S.—Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).
- 4 U.S.—Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).
- 5 U.S.—Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).
- 6 U.S.—Donahoo v. Household Finance Corp., 472 F. Supp. 353 (E.D. Mich. 1979).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1854. State or federal action based on set-off

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

In general, a bank's exercise of its right of set-off against a depositor's account does not constitute state action for due process purposes.

In general, a bank's exercise of its right of set-off against a depositor's account does not constitute state action for due process purposes,¹ where a statute authorizing set-offs merely codifies the right of set-off as it previously existed,² and does not compel or encourage the exercise of such right.³ It has been noted, however, that a court order affirmatively requiring an unwilling party to exercise a right of set-off is a form of state action.⁴

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Footnotes

¹ Idaho—[Meyer v. Idaho First Nat. Bank](#), 96 Idaho 208, 525 P.2d 990 (1974).

Minn.—*Nietzel v. Farmers and Merchants State Bank of Breckenridge*, 307 Minn. 147, 238 N.W.2d 437, 20 U.C.C. Rep. Serv. 553 (1976).

2 Cal.—*Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266 (1974).

3 Cal.—*Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266 (1974).

4 Cal.—*Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266 (1974).

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16C C.J.S. Constitutional Law § 1855

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

a. In General

§ 1855. State or federal action based on summary detention or seizure of property

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

Under a statutory distraint procedure, the State is not significantly involved for due process purposes where a lessor takes possession of a tenant's property pursuant to a statute that simply codifies the lessor's common-law right to do so and that does not have the State carry out the lessor's rights.

Where the execution of liens traditionally has been the function of a sheriff, state action can be found in an innkeeper's execution on his or her own lien¹ as where he or she summarily seizes a guest's property.²

A creditor's utilization of a self-service storage facility statute for the private seizure and sale of a debtor's property, without a hearing or judicial supervision, does not constitute state action that implicates due process guarantees.³

Under a statutory distraint procedure, the State is not significantly involved for due process purposes, where a lessor takes possession of a tenant's property pursuant to a statute that simply codifies the lessor's common-law right to do so and that does not have the state carry out the lessor's rights.⁴ Since distraint was a common-law remedy long before enactment of

the Fourteenth Amendment, a state's passage of a landlord and tenant statute is not a delegation to a private party of powers traditionally reserved to the sovereign; rather, the statute merely regulates how those powers are to be used.⁵

On the other hand, even though under a statute authorizing nonjudicial distraints for rent, the initial action of the dstraint itself may be taken privately, in light of the fact that the goods and chattels of the tenant are inventoried and appraised with the assistance of public officers if the tenant fails to seek to dissolve the dstraint and the public officers are involved in the event of a surplus upon the sale of the articles, the right of restraint may be characterized as being imposed by the state both as to substantive right and procedure and such conduct is not voluntary private conduct beyond the Due Process Clause.⁶

Detention of a motor vehicle pursuant to a mechanic's lien by a private individual in possession of the vehicle may not constitute state action for purposes of due process protections.⁷ The detention by a garageman of an automobile, pursuant to a common-law or statutory lien, does not constitute state action for due process purposes.⁸ The possessory nature of such a lien does not constitute "state action" for purposes of triggering protections accorded by the due process guaranty.⁹

Detention of personal property by the operators of a mobile home park who act under the authority of a statutory innkeepers lien as applied to mobile homes does not constitute state action.¹⁰

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Footnotes

- 1 N.Y.—*Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973).
- 2 N.Y.—*Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973).
- 3 La.—*Price v. U-Haul Co. of Louisiana*, 745 So. 2d 593, 39 U.C.C. Rep. Serv. 2d 579 (La. 1999).
- 4 Ill.—*USA I Lehnndorff Vermoegensverwaltung GmbH and Cie v. Cousins Club, Inc.*, 64 Ill. 2d 11, 348 N.E.2d 831 (1976).
- 5 U.S.—*SMI Industries, Inc. v. Lanard & Axilbund, Inc.*, 481 F. Supp. 459 (E.D. Pa. 1979).
- 6 N.J.—*Van Ness Industries, Inc. v. Claremont Painting & Decorating Co.*, 129 N.J. Super. 507, 324 A.2d 102 (Ch. Div. 1974).
- 7 Ind.—*Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95 (Ind. Ct. App. 1995).
- 8 U.S.—*Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977).
- 9 N.Y.—*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).
- 10 Ind.—*Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95 (Ind. Ct. App. 1995).

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16C C.J.S. Constitutional Law § 1856

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

b. Repossession of Property

§ 1856. State or federal action based on repossession of property, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

A creditor need not comply with due process where his or her self-help repossession of property is a purely private action, or where a statute authorizing or permitting self-help repossession does not change the common law, or previously codified statutory law.

A creditor need not comply with due process where his or her self-help repossession of property is a purely private action.¹ As a general rule, state authorization or permission,² as by the adoption of a provision of the Uniform Commercial Code,³ of peaceful,⁴ self-help repossession by a creditor,⁵ or repossession without judicial process,⁶ pursuant to the terms of a private agreement,⁷ does not constitute state action for purposes of the due process clauses.

There is no state action sufficient to invoke constitutional due process guarantees where a statute authorizing or permitting self-help repossession does not change the common law,⁸ or previously codified statutory law,⁹ or provide the secured party with

rights not previously available under the common law,¹⁰ as where the right of repossession existed at common law,¹¹ or where it compels the act of peaceful repossession,¹² or does not offer any more incentive to resort to self-help than did a prior law.¹³

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Footnotes

- 1 Iowa—*Interfirst Bank, Dallas, Texas v. Hanson*, 395 N.W.2d 857, 2 U.C.C. Rep. Serv. 2d 1449 (Iowa 1986).
- 2 Mass.—*Penney v. First Nat. Bank of Boston*, 385 Mass. 715, 433 N.E.2d 901, 33 U.C.C. Rep. Serv. 433 (1982).
Vt.—*Colonial Swimming Pool Co. v. Camperama of Vermont, Inc.*, 134 Vt. 463, 365 A.2d 262, 20 U.C.C. Rep. Serv. 810 (1976).
- 3 Fla.—*Lloyd v. Brendemuehl*, 714 So. 2d 1154 (Fla. 5th DCA 1998).
Idaho—*Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).
Self-executing statute
A statute granting a secured party the right to take possession of collateral without judicial process, without notice and/or a right to be heard, was wholly self-executing and took no involvement by any state employee to fully effect its purpose, and thus was not an unconstitutional violation of a debtor's due process rights.
N.C.—*Giles v. First Virginia Credit Services, Inc.*, 149 N.C. App. 89, 560 S.E.2d 557, 46 U.C.C. Rep. Serv. 2d 913 (2002).
- 4 Ala.—*Speigle v. Chrysler Credit Corp.*, 56 Ala. App. 469, 323 So. 2d 360, 17 U.C.C. Rep. Serv. 1395 (Civ. App. 1975).
Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 5 U.S.—*T.R. Ashe, Inc. v. Bolus*, 34 F. Supp. 2d 272 (M.D. Pa. 1999).
Mass.—*Penney v. First Nat. Bank of Boston*, 385 Mass. 715, 433 N.E.2d 901, 33 U.C.C. Rep. Serv. 433 (1982).
- 6 Colo.—*John Deere Co. of Kansas City v. Catalano*, 186 Colo. 101, 525 P.2d 1153, 15 U.C.C. Rep. Serv. 540 (1974).
- 7 Ala.—*Speigle v. Chrysler Credit Corp.*, 56 Ala. App. 469, 323 So. 2d 360, 17 U.C.C. Rep. Serv. 1395 (Civ. App. 1975).
Utah—*Dirks v. Cornwell*, 754 P.2d 946 (Utah Ct. App. 1988).
Self-help repossession under lease
Iowa—*Interfirst Bank, Dallas, Texas v. Hanson*, 395 N.W.2d 857, 2 U.C.C. Rep. Serv. 2d 1449 (Iowa 1986).
Waiver of notice contained in contract
There was no state action in connection with a waiver of notice contained in a contract between a creditor and debtor, and thus, the creditor's repossession of the debtor's automobile without notice, and an opportunity to be heard was not an unconstitutional violation of debtors' due process rights.
N.C.—*Giles v. First Virginia Credit Services, Inc.*, 149 N.C. App. 89, 560 S.E.2d 557, 46 U.C.C. Rep. Serv. 2d 913 (2002).
- 8 Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 9 Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 10 Vt.—*Colonial Swimming Pool Co. v. Camperama of Vermont, Inc.*, 134 Vt. 463, 365 A.2d 262, 20 U.C.C. Rep. Serv. 810 (1976).
- 11 Cal.—*Kipp v. Cozens*, 40 Cal. App. 3d 709, 115 Cal. Rptr. 423, 14 U.C.C. Rep. Serv. 1453 (1st Dist. 1974).
- 12 Vt.—*Colonial Swimming Pool Co. v. Camperama of Vermont, Inc.*, 134 Vt. 463, 365 A.2d 262, 20 U.C.C. Rep. Serv. 810 (1976).
- 13 Vt.—*Colonial Swimming Pool Co. v. Camperama of Vermont, Inc.*, 134 Vt. 463, 365 A.2d 262, 20 U.C.C. Rep. Serv. 810 (1976).

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16C C.J.S. Constitutional Law § 1857

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

b. Repossession of Property

§ 1857. State or federal action based on involvement of government officials or employees in self-help repossession

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

There is no state action sufficient to invoke constitutional due process guarantees where a statute authorizing or permitting self-help repossession does not involve participation of any governmental employees or officials or require the aid or interaction of any state agency, organization, or function.

There is no state action sufficient to invoke constitutional due process guarantees where a statute authorizing or permitting self-help repossession does not involve participation of any governmental employees,¹ or require the aid or interaction of any state agency, organization, or function,² or state official,³ whether a judge,⁴ clerk of court,⁵ or police officer.⁶

The mere presence of police at the scene of a private repossession does not, alone, constitute state action causing a deprivation of a protected property interest for the purposes of a procedural due process claim.⁷ Police officers are not state actors during a private repossession if they act only to keep the peace,⁸ but they cross the line if they affirmatively intervene to aid the

repossessor,⁹ enough that the repossession would not have occurred without the officer's help.¹⁰ When a police officer begins to take a more active hand in the repossession, and as such involvement becomes increasingly critical, a point may be reached at which police assistance at the scene of a private repossession may cause the repossession to take on the character of state action.¹¹

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Footnotes

- 1 Mass.—*Penney v. First Nat. Bank of Boston*, 385 Mass. 715, 433 N.E.2d 901, 33 U.C.C. Rep. Serv. 433 (1982).
- 2 Vt.—*Colonial Swimming Pool Co. v. Camperama of Vermont, Inc.*, 134 Vt. 463, 365 A.2d 262, 20 U.C.C. Rep. Serv. 810 (1976).
- 3 Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 4 Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 5 Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 6 U.S.—*Abbott v. Latshaw*, 164 F.3d 141 (3d Cir. 1998); *Moore v. Carpenter*, 404 F.3d 1043 (8th Cir. 2005).
Kan.—*Benschoter v. First Nat. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042, 18 U.C.C. Rep. Serv. 246 (1975).
- 7 U.S.—*Abbott v. Latshaw*, 164 F.3d 141 (3d Cir. 1998).
- 8 U.S.—*Moore v. Carpenter*, 404 F.3d 1043 (8th Cir. 2005); *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004).
- 9 U.S.—*Moore v. Carpenter*, 404 F.3d 1043 (8th Cir. 2005); *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004).
- 10 U.S.—*Moore v. Carpenter*, 404 F.3d 1043 (8th Cir. 2005).
- 11 U.S.—*Barrett v. Harwood*, 189 F.3d 297, 40 U.C.C. Rep. Serv. 2d 581 (2d Cir. 1999).

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16C C.J.S. Constitutional Law § 1858

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

c. Involuntary Sale Procedures

§ 1858. State or federal action based on involuntary sale procedures, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

Under a provision of the Uniform Commercial Code, adopted by a state, permitting a private party to sell goods of a debtor in his or her possession, the action of a private party in selling the goods does not constitute state action for due process purposes.

Under a provision of the Uniform Commercial Code, adopted by a state, permitting a private party to sell goods of a debtor in his or her possession,¹ the action of a private party in selling the goods does not constitute state action for due process purposes,² where the statute does not delegate to such private party an exclusive prerogative of the sovereign,³ and where it is not the only means for resolving a purely private dispute.⁴ Moreover, such sale by a private party of a debtor's goods is not properly attributable to the State for purposes of establishing state action under the Due Process Clause on the ground that the State has authorized and encouraged the action in enacting the statute permitting such action.⁵

Under some authorities, involuntary sale procedures do constitute state action for due process purposes.⁶ Such rule as to the presence of state action in such procedures is applicable where, although the particular possessory lien involved is a creature of the common law,⁷ the creditor was not authorized at common law to sell the property in satisfaction of the lien,⁸ and thus, the right to sell is authorized by, or is a creature of, statute,⁹ and where it can be said that the involuntary sale procedure involves a delegation to private parties of functions traditionally associated with sovereignty,¹⁰ as by delegating to private individuals or endowing them with powers traditionally reserved to or vested in sheriffs or constables.¹¹

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Footnotes

- 1 U.S.—*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185, 23 U.C.C. Rep. Serv. 1105 (1978).
- 2 U.S.—*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185, 23 U.C.C. Rep. Serv. 1105 (1978); *Total Television Entertainment Corp. v. Chestnut Hill Village Associates*, 145 F.R.D. 375, 24 Fed. R. Serv. 3d 1202 (E.D. Pa. 1992).
- 3 U.S.—*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185, 23 U.C.C. Rep. Serv. 1105 (1978).
- 4 U.S.—*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185, 23 U.C.C. Rep. Serv. 1105 (1978).
- 5 U.S.—*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185, 23 U.C.C. Rep. Serv. 1105 (1978).
- 6 U.S.—*Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977); *Swiggett v. Watson*, 441 F. Supp. 254 (D. Del. 1977).
Cal.—*Martin v. Heady*, 103 Cal. App. 3d 580, 163 Cal. Rptr. 117 (2d Dist. 1980).
N.Y.—*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).
- 7 U.S.—*Swiggett v. Watson*, 441 F. Supp. 254 (D. Del. 1977).
- 8 U.S.—*Swiggett v. Watson*, 441 F. Supp. 254 (D. Del. 1977).
Cal.—*Martin v. Heady*, 103 Cal. App. 3d 580, 163 Cal. Rptr. 117 (2d Dist. 1980).
- 9 U.S.—*Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977); *Swiggett v. Watson*, 441 F. Supp. 254 (D. Del. 1977).
- 10 N.Y.—*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).
- 11 U.S.—*Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977); *Swiggett v. Watson*, 441 F. Supp. 254 (D. Del. 1977).
N.Y.—*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

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16C C.J.S. Constitutional Law § 1859

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

3. Creditors' Remedies

c. Involuntary Sale Procedures

§ 1859. State or federal action based on nonjudicial foreclosure

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

A nonjudicial foreclosure procedure allowed by statute with respect to a lien on real property does not constitute state or federal action for due process purposes, where the power of sale exercised on behalf of the creditor in such a procedure is a right authorized or created by contract between the parties, rather than by statute, and where there is otherwise no direct or overt government involvement or participation.

Absent exceptional circumstances,¹ a nonjudicial foreclosure procedure allowed by statute with respect to a lien on real property does not constitute state or federal action for due process purposes² where the power of sale exercised on behalf of the creditor in such a procedure is a right authorized or created by contract between the parties,³ rather than by statute,⁴ and where there is otherwise no direct or overt government involvement⁵ or participation.⁶

The threshold question that the court must determine with respect to a nonjudicial foreclosure is whether the State is significantly involved in the nonjudicial foreclosure procedure so as to bring it within the reach of the due process clauses.⁷ In determining

the question, a statute setting minimum procedural requirements for the exercise of a power of sale conferred in a deed of trust is not alone sufficient to implicate the State in the nonjudicial foreclosure so that the action can fairly be treated as that of the State itself for due process purposes,⁸ and the fact that the State merely recognizes the legal effect of involuntary changes in ownership brought about by the exercise of a power of sale conferred in a deed of trust does not convert them into state acts for due process purposes.⁹

The fact a state may enforce an agreement parties make with respect to a nonjudicial foreclosure procedure does not imbue the private agreement with state action on which to predicate a due process claim,¹⁰ and the fact that a purchaser at a sale has the right to resort to the courts to enforce his or her right to possession does not render a nonjudicial foreclosure state action.¹¹

Virtually all formal private arrangements assume, at some point, the supportive role of the State; to hold that the State, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase to a significant extent the constitutional line between private and state action and subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have a binding legal effect.¹²

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Footnotes

- 1 Me.—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
- 2 U.S.—*Altman v. PNC Mortg.*, 850 F. Supp. 2d 1057 (E.D. Cal. 2012); *Geist v. California Reconveyance Co.*, 2010 WL 1999854 (N.D. Cal. 2010); *Bullock v. Resolution Trust Corp.*, 918 F. Supp. 1001 (S.D. Miss. 1995).
Cal.—*Lyons v. Santa Barbara County Sheriff's Office*, 231 Cal. App. 4th 1499, 181 Cal. Rptr. 3d 186 (2d Dist. 2014), review denied, (Feb. 11, 2015).
Iowa—*Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404 (Iowa 1997).
Me.—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
Lien sale
A storage facility's lien sale of a tenant's property to recover for past due rent did not amount to "state action," as required to support the tenant's claim that the sale violated due process under a state constitution; other than enacting the statute that gave the storage facility the right to conduct a lien sale and which provided the storage facility with a self-help remedy, the State was not significantly involved in the seizure and sale of the property in that it did not compel, assist in, or significantly encourage the seizure and sale of the tenant's property.
Ill.—*Hill v. PS Illinois Trust*, 368 Ill. App. 3d 310, 305 Ill. Dec. 755, 856 N.E.2d 560 (1st Dist. 2006).
- 3 U.S.—*Grapentine v. Pawtucket Credit Union*, 755 F.3d 29 (1st Cir. 2014) (under Rhode Island law); *Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229 (8th Cir. 1980).
D.C.—*Pappas v. Eastern Sav. Bank, FSB*, 911 A.2d 1230 (D.C. 2006).
Iowa—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
Tenn.—*CitiMortgage, Inc. v. Drake*, 410 S.W.3d 797 (Tenn. Ct. App. 2013), appeal denied, (Aug. 14, 2013).
Foreclosure by advertising
Foreclosure by advertising does not involve "state action" for due process purposes where the theory underlying a state's foreclosure by advertisement scheme is that the provisions of the foreclosure by advertisement statute, become a part of the contract between the mortgagor and the mortgagee.
Mich.—*Manufacturers Hanover Mortg. Corp. v. Snell*, 142 Mich. App. 548, 370 N.W.2d 401 (1985).
- 4 U.S.—*Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229 (8th Cir. 1980).
Cal.—*Mercury Cas. Co. v. Kamal*, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
- 5 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975); *Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003).
Iowa—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
- 6 U.S.—*Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229 (8th Cir. 1980).

- 7 Iowa—Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404 (Iowa 1997).
U.S.—Mercury Cas. Co. v. Kamal, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
8 U.S.—Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975).
9 Cal.—Mercury Cas. Co. v. Kamal, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
10 U.S.—Global Industries, Inc. v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974).
11 Mo.—Minnesota Mut. Life Ins. Co. v. Fuhrman, 521 S.W.2d 440 (Mo. 1975).
12 U.S.—Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975).

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16C C.J.S. Constitutional Law § 1860

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 1860. Nonpresence of state or federal action upheld against various contentions

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

The general rule as to the nonpresence of state or federal action in a nonjudicial foreclosure procedure allowed by statute has been upheld as against various contentions.

The general rule as to the nonpresence of state or federal action in a nonjudicial foreclosure procedure allowed by statute has been upheld as against various contentions,¹ such as that the State has become significantly involved in such activity through its comprehensive and detailed regulation of mortgage transactions and, more generally, of real property transactions.² Also included among such contentions is the claim that a statute allowing nonjudicial foreclosure constitutes state action because it encourages or facilitates the use of that remedy³ or otherwise constitutes significant state involvement in nonjudicial foreclosure.⁴

In upholding a finding of the nonpresence in a nonjudicial foreclosure of state action, as against the contention that state action is present by reason of the comprehensive and detailed regulation of nonjudicial foreclosure, it has been noted that the mere

fact that the State has undertaken regulation of an activity does not mean that the activity so regulated,⁵ but not forbidden,⁶ is to be imputed to the State.

The courts have failed to be persuaded of the presence of state action in nonjudicial foreclosure by the contention of the existence of state action by reason of the encouragement or facilitation by statute of nonjudicial foreclosure, or that the statute otherwise constitutes significant state involvement, where the statute does not compel the exercise of the power of sale,⁷ as where the statute does not confer the power of sale, but merely authorizes parties to contract for the express terms of foreclosure upon default;⁸ where the decision to exercise the power is a determination to be made by the creditor;⁹ or where the statute merely restricts and regulates the exercise of the power of sale,¹⁰ once a choice has been made by the creditor to foreclose a deed of trust in that manner.¹¹

No "state action" exists in construing statutes to allow the postponement of a nonjudicial foreclosure sale without notice to the defaulting maker of a promissory note secured by a deed of trust, for the purpose of the maker's due process claim since, even assuming the presence of state action, the maker suffers no deprivation of due process where both the maker and potential third-party bidders receive sufficient notice.¹²

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Footnotes

- 1 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
- 2 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
As to effect of state or federal regulation of private entity, generally, see § 1847.
- 3 U.S.—*Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975).
Entitlement to conclusive presumption
A statute providing that a bona fide purchaser for value at a trustee's sale conducted as part of a nonjudicial foreclosure under a trust deed is entitled to a conclusive presumption as to the trustee's compliance with the statutory notice requirement does not involve "state action" on the basis of encouraging the use of private foreclosures.
Cal.—*Homestead Savings v. Darmiento*, 230 Cal. App. 3d 424, 281 Cal. Rptr. 367 (2d Dist. 1991).
- 4 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
Ark.—*Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007).
- 5 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
- 6 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
- 7 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
- 8 U.S.—*Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003).
- 9 Cal.—*Mercury Cas. Co. v. Kamal*, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
- 10 U.S.—*Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975).
Cal.—*Mercury Cas. Co. v. Kamal*, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
- 11 Cal.—*Mercury Cas. Co. v. Kamal*, 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
- 12 Alaska—*Ostrow v. Higgins*, 722 P.2d 936 (Alaska 1986).

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16C C.J.S. Constitutional Law § 1861

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

D. What Constitutes State or Federal Action

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§ 1861. Nonpresence of state or federal action upheld against various contentions—Surrendering traditional government functions to private party

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3944, 3945

The general rule as to the nonpresence of state or federal action in a nonjudicial foreclosure procedure allowed by statute has been upheld as against the contention that state action is involved in a nonjudicial foreclosure because the State surrenders a traditionally governmental function to a private party, or delegates thereto an activity which the State normally undertakes itself, as by delegating to a private party a traditional government function.

The general rule as to the nonpresence of state or federal action in a nonjudicial foreclosure procedure allowed by statute has been upheld as against the contention that state action is involved in a nonjudicial foreclosure because the State surrenders a traditionally governmental function to a private party,¹ or delegates thereto an activity which the State normally undertakes itself,² as by delegating to a private party a traditional government function.³

Where the rights exercised by a mortgagee upon default of the mortgagor are essentially the same ones that existed at common law,⁴ or where nonjudicial foreclosure under a power of sale is a remedy that has been so widely used and recognized in a

particular jurisdiction over a long period of time that it can be characterized as a traditional remedy, and as such has paralleled the foreclosure remedies provided by the State,⁵ it cannot be said that foreclosure under a power of sale has been traditionally and exclusively performed by the State,⁶ that the statute empowers the mortgagee to engage in any traditional state function,⁷ or that termination of a debtor's equity of redemption is the exclusive prerogative of the State.⁸

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Footnotes

- 1 U.S.—[Barrera v. Security Bldg. & Inv. Corp.](#), 519 F.2d 1166 (5th Cir. 1975).
- 2 U.S.—[Northrip v. Federal Nat. Mortg. Ass'n](#), 527 F.2d 23 (6th Cir. 1975).
- 3 U.S.—[Apao v. Bank of New York](#), 324 F.3d 1091 (9th Cir. 2003).
- 4 U.S.—[Northrip v. Federal Nat. Mortg. Ass'n](#), 527 F.2d 23 (6th Cir. 1975).
- 5 U.S.—[Barrera v. Security Bldg. & Inv. Corp.](#), 519 F.2d 1166 (5th Cir. 1975).
Cal.—[Mercury Cas. Co. v. Kamal](#), 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
- 6 Cal.—[Mercury Cas. Co. v. Kamal](#), 146 Cal. Rptr. 208, 578 P.2d 945 (Cal. 1978).
As to exercise by private entity of powers traditionally exclusive prerogative of State as constituting state action, generally, see § 1845.
- 7 U.S.—[Northrip v. Federal Nat. Mortg. Ass'n](#), 527 F.2d 23 (6th Cir. 1975).
- 8 U.S.—[Barrera v. Security Bldg. & Inv. Corp.](#), 519 F.2d 1166 (5th Cir. 1975).

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16C C.J.S. Constitutional Law § 1862

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 1862. Involvement by particular officials as not creating state action

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West's Key Number Digest

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Under certain circumstances, the involvement of or participation by particular officials in a nonjudicial foreclosure does not create state action for due process purposes.

Although a finding of the nonpresence of state or federal action in a nonjudicial foreclosure generally requires, among other things, that there be no involvement or participation by the state or federal government in the nonjudicial foreclosure, the participation in such procedure by a clerk¹ a county recorder,² or a register of deeds³ does not create state action for due process purposes.

The general rule may apply where a clerk performs the ministerial act of recording a deed under a power of sale⁴ where a clerk of court is involved only in receiving the deposit of any excess funds and recording the deed,⁵ where a county recorder ascertains that a document relating to real property contains the information required by law,⁶ or where a register of deeds is required to do no more than to record the deed and indicate whether a redemption takes place⁷ or even though the register of

deeds records a notice of foreclosure.⁸ On the other hand, a statutory procedure for foreclosure and sale under a deed of trust containing a power of sale, under which the clerk of the court audits the trustee's report of the foreclosure sale, may involve state action for due process purposes.⁹

Sale conducted by official.

The fact that a deputy sheriff conducts the foreclosure sale does not constitute state action where state law permits the parties to agree that another party will conduct the sale.¹⁰

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Footnotes

- 1 U.S.—*Global Industries, Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974).
- 2 U.S.—*Lawson v. Smith*, 402 F. Supp. 851 (N.D. Cal. 1975).
Cal.—*Lyons v. Santa Barbara County Sheriff's Office*, 231 Cal. App. 4th 1499, 181 Cal. Rptr. 3d 186 (2d Dist. 2014), review denied, (Feb. 11, 2015).
Iowa—*Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404 (Iowa 1997).
- 3 U.S.—*Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975).
Me.—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
- 4 U.S.—*Global Industries, Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974).
Trustee's sale
Cal.—*Lyons v. Santa Barbara County Sheriff's Office*, 231 Cal. App. 4th 1499, 181 Cal. Rptr. 3d 186 (2d Dist. 2014), review denied, (Feb. 11, 2015).
- 5 U.S.—*Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Ariz. 1976).
- 6 U.S.—*Lawson v. Smith*, 402 F. Supp. 851 (N.D. Cal. 1975).
- 7 U.S.—*Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975).
- 8 Me.—*Northup v. Poling*, 2000 ME 199, 761 A.2d 872 (Me. 2000).
- 9 U.S.—*Turner v. Blackburn*, 389 F. Supp. 1250 (W.D. N.C. 1975).
- 10 U.S.—*Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty


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A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Due Process

West's A.L.R. Digest, [Constitutional Law](#)  [3865](#) to [3875](#), [3879](#), [3887](#), [3893](#) to [3902](#), [3905](#) to [3907](#), [3920](#) to [3932](#), [3953](#), [4001](#), [4008](#), [4027](#)

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16C C.J.S. Constitutional Law § 1863

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1863. Nature and scope of due process guaranty, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3865, 3869

The constitutional guaranty of due process of law is intended to protect the individual against arbitrary exercise of governmental power and secure to all equal protection of the law, and it is a matter of substance, not of form.

"Due process" is a generic term,¹ the concept of which is broad² and sweeping.³ It may be contravened in various ways and forms.⁴ It connotes a deprivation of life, liberty, or property that is beyond the lawful power of government,⁵ and generally, considerations of due process involve or relate to an official governmental act which offends some principle of justice so rooted in the traditions and conscience of the American people as to be ranked as fundamental.⁶

While there is authority that the requirements of due process extend to every case of the exercise of governmental power,⁷ there is also authority that the requirements of the Due Process Clause apply only to judicial proceedings and to proceedings of a quasi-judicial nature.⁸ A citizen's right to due process of law encompasses both procedural and substantive due process,⁹ but the right to substantive due process is no greater than the right to procedural due process.¹⁰ Accordingly, the Due Process Clause not only accords procedural safeguards to protected interests but likewise protects substantive aspects of liberty against

impermissible government restrictions.¹¹ The right to substantive due process protects against governmental actions that are arbitrary and wrong regardless of the fairness of the procedures used to implement them¹² whereas procedural due process addresses the fairness of the manner in which a governmental action is implemented.¹³ History and tradition are the starting point, but not in all cases the ending point, of a substantive due process inquiry.¹⁴ Indeed, the primary guide in determining whether a particular principle is fundamental for due process purposes is historical practice.¹⁵

The Due Process Clause is one of comprehensive generality,¹⁶ and in reducing it to apply in concrete cases, there are different schools of thought.¹⁷ So numerous, so varied, and in many cases so trifling have been the questions raised as to the protection afforded by the guaranty of due process of law that objections founded on it have been judicially characterized as "those last resorts of desperate cases."¹⁸

Due process consists in the protection of the individual against arbitrary action.¹⁹ However, only the most egregious official conduct is arbitrary in the substantive due process sense.²⁰ An abuse of power is arbitrary in the substantive due process sense if it shocks the conscience, but a plaintiff claiming such a violation must show that the official conduct is unjustifiable by any governmental interest.²¹ The Due Process Clauses of the Fifth and Fourteenth Amendments are directed at the protection of the individual²² and forbid both the federal government and a state from depriving any person of life, liberty, or property without due process of law.²³ Thus, an individual is entitled to the immunity as much against the State as against the federal government.²⁴

Generally, due process does not apply to the indirect adverse effects of governmental action,²⁵ and whether or not due process is afforded depends not on the particular hardship which may befall a person under exceptional circumstances but whether the applicable system of jurisprudence, with its provisions for safeguarding the rights of litigants, is due process.²⁶

The fact that a rule of law may in certain instances work a hardship does not violate the due process of law clause provided it operates without discrimination and in like manner against all persons of a class.²⁷ Likewise, an act is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work an inequitable result.²⁸ Thus, it does not follow from hardship that due process has been denied,²⁹ and due process does not guarantee against the imposition of mere inconveniences, hardships, or encumbrances on persons who must deal with the federal, state, or local government³⁰ nor does it guarantee against error-free government.³¹

While the Due Process Clause has been applied to prevent governmental destruction of existing economic values,³² it has not been, and cannot be, applied to insure values or to restore values that have been lost by the operation of economic forces.³³ The guaranty does not protect a citizen against himself or herself or against his or her own agreements.³⁴

The guaranty of due process is a matter of substance, not of form.³⁵ The guaranty constitutes a legal right assertable in the courts.³⁶ The right, however, is not an absolute one,³⁷ to be enjoyed or exercised by a person without limitation or reference to the correlative rights of others³⁸ but is circumscribed by the requirements of the public good.³⁹ A deprivation of due process may be effected by compliance, as well as by noncompliance, with a statute.⁴⁰ Furthermore, the lack of due process of law may arise either from the fact that the law attempted to be enforced is void or that the forms of law have not been observed.⁴¹ Therefore, the Fourteenth Amendment covers the unequal enforcement of valid laws as well as any enforcement of invalid laws.⁴²

With respect to due process, mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, and property,⁴³ and due process requires that all be ruled by law and not by fiat.⁴⁴

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Footnotes

- 1 N.Y.—*Blair v. DuMond*, 200 Misc. 1036, 108 N.Y.S.2d 738 (Sup 1951), judgment aff'd, 280 A.D. 1021, 117 N.Y.S.2d 23 (3d Dep't 1952), order resettled on other grounds, 281 A.D. 776, 117 N.Y.S.2d 918 (3d Dep't 1953).
- 2 Wyo.—*Pirie v. Kamps*, 68 Wyo. 83, 229 P.2d 927, 26 A.L.R.2d 647 (1951).
Applies to a broad spectrum of concerns
 Cal.—In re *Conservatorship of Person of John L.*, 48 Cal. 4th 131, 105 Cal. Rptr. 3d 424, 225 P.3d 554 (2010).
- 3 Wyo.—*Pirie v. Kamps*, 68 Wyo. 83, 229 P.2d 927, 26 A.L.R.2d 647 (1951).
- 4 N.Y.—*Blair v. DuMond*, 200 Misc. 1036, 108 N.Y.S.2d 738 (Sup 1951), judgment aff'd, 280 A.D. 1021, 117 N.Y.S.2d 23 (3d Dep't 1952), order resettled, 281 A.D. 776, 117 N.Y.S.2d 918 (3d Dep't 1953).
Legislation colliding with First and Fourteenth Amendments
 The test of legislation which collides with the Fourteenth Amendment, because it also collides with principles of the First Amendment, is much more definite than the test when only the Fourteenth Amendment is involved, and much of the vagueness of the due process of law clause disappears when specific prohibitions of the First Amendment become its standard.
 U.S.—*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).
- 5 U.S.—*James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971), judgment aff'd, 448 F.2d 785 (4th Cir. 1971).
 N.Y.—*Blair v. DuMond*, 200 Misc. 1036, 108 N.Y.S.2d 738 (Sup 1951), judgment aff'd, 280 A.D. 1021, 117 N.Y.S.2d 23 (3d Dep't 1952), order resettled on other grounds, 281 A.D. 776, 117 N.Y.S.2d 918 (3d Dep't 1953).
Protection
 Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
 Neb.—*Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 (2010).
Delegation of power
 (1) At times, an improper delegation under state law may rise to the level of a due process violation and implicate federal constitutional standards.
 U.S.—*Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978).
 (2) Due process, as a general rule, requires court intervention with a delegation of power only if the plaintiff's interests cannot be effectively protected short of invalidating the delegation of power.
 U.S.—*Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970).
 (3) An attempted delegation of legislative powers to private persons is repugnant to due process where it permits the arbitrary exercise of such powers by such individuals and therefore violates the constitutional requirement of reasonableness.
 Okla.—*Potter v. State*, 1973 OK CR 228, 509 P.2d 933 (Okla. Crim. App. 1973).
Bad faith
 An official may violate due process rights without necessarily acting in bad faith.
 U.S.—*Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (rejected on other grounds by, *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981)).
State constitution
 For purposes of a state constitution's article prohibiting deprivation of life, liberty, or estate but by the law of the land, "law of the land" means due process of law.
 N.H.—*State v. LaPlaca*, 162 N.H. 174, 27 A.3d 719 (2011).
- 6 D.C.—*U.S. v. McDougald*, 350 A.2d 375 (D.C. 1976).
Test

The test of whether due process of law has been violated is whether the challenged practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Iowa—[Auxier v. Woodward State Hospital-School](#), 266 N.W.2d 139 (Iowa 1978).

Fla.—[Keller v. State ex rel. Epperson](#), 265 So. 2d 497 (Fla. 1972).

As to who is bound by guaranty, see §§ 1827 to 1838.

Exercise of power to regulate

(1) The power to regulate must be so exercised as not, in attaining permissible end, unduly to infringe a protected freedom.

U.S.—[National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers](#), 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1964); [Cantwell v. State of Connecticut](#), 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).

(2) A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade an area of protected freedoms.

U.S.—[National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers](#), 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1964).

Adjudication of rights

Due process applies to any adjudication of important rights.

Mich.—[In re LaFlure](#), 48 Mich. App. 377, 210 N.W.2d 482 (1973).

Systems and procedures

Systems and procedures established by governmental entities which impact upon significant rights and interests of citizens must be so structured as to insure that due process of law is accorded citizens.

U.S.—[Shaffer v. Board of School Directors of Albert Gallatin Area School Dist.](#), 522 F. Supp. 1138 (W.D. Pa. 1981), order rev'd on other grounds, 687 F.2d 718, 6 Ed. Law Rep. 487 (3d Cir. 1982).

Scope of protection

The scope of Fifth Amendment protection cannot depend on the language of a federal statute.

U.S.—[De Malherbe v. International Union of Elevator Constructors](#), 438 F. Supp. 1121, 25 Fed. R. Serv. 2d 35 (N.D. Cal. 1977).

Md.—[Union Investors, Inc. v. Montgomery County](#), 244 Md. 585, 224 A.2d 453 (1966).

Investigation proceedings

Congressional investigation proceedings are outside the guaranties of the Due Process Clause of the Fifth Amendment.

U.S.—[U.S. v. Fort](#), 443 F.2d 670 (D.C. Cir. 1970).

Government and employees

An employer-employee relationship as between the government and its employees is not within the application of the requirements.

U.S.—[Washington v. Clark](#), 84 F. Supp. 964 (D. D.C. 1949), judgment aff'd, 182 F.2d 375 (D.C. Cir. 1950), judgment aff'd, 341 U.S. 923, 71 S. Ct. 795, 95 L. Ed. 1356 (1951).

Ark.—[Johnson v. Encompass Ins. Co.](#), 355 Ark. 1, 130 S.W.3d 553 (2003).

Fla.—[Haire v. Florida Dept. of Agriculture and Consumer Services](#), 870 So. 2d 774 (Fla. 2004).

Md.—[Knapp v. Smethurst](#), 139 Md. App. 676, 779 A.2d 970 (2001).

Wash.—[Bellevue School Dist. v. E.S.](#), 171 Wash. 2d 695, 257 P.3d 570, 269 Ed. Law Rep. 915 (2011).

Difference

Substantive due process implicates the essence of state action rather than its modalities; procedural due process differs from substantive due process by focusing not on what a person has been deprived of but rather on how the deprivation was accomplished.

N.Y.—[Mark G. v. Sabol](#), 93 N.Y.2d 710, 695 N.Y.S.2d 730, 717 N.E.2d 1067 (1999).

U.S.—[Mozier v. Board of Ed. of Cherry Hill Tp., Camden County](#), 450 F. Supp. 742 (D.N.J. 1977).

Mo.—[Johnson v. City of Buckner](#), 610 S.W.2d 406 (Mo. Ct. App. W.D. 1980).

U.S.—[Harrah Independent School Dist. v. Martin](#), 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979);

[Kelley v. Johnson](#), 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976).

Test

The test for a substantive due process violation first requires the determination of whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation.

Iowa—[City of Iowa City v. Hagen Electronics, Inc.](#), 545 N.W.2d 530 (Iowa 1996).

Conception of fundamental justice

The substantive content of the Due Process Clause, which goes beyond the specific provisions of the Bill of Rights, embodies the "conception of fundamental justice" which protects against state transgression of personal immunities that are implicit in the concept of ordered liberty.

U.S.—[Sotto v. Wainwright](#), 601 F.2d 184 (5th Cir. 1979).

12 Iowa—[In re Detention of Willis](#), 691 N.W.2d 726 (Iowa 2005).

Miss.—[Harris v. Mississippi Valley State University](#), 873 So. 2d 970, 188 Ed. Law Rep. 562 (Miss. 2004).

Wis.—[In re Paternity of John R.B.](#), 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849 (2005).

13 Wis.—[In re Paternity of John R.B.](#), 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849 (2005).

14 U.S.—[Lawrence v. Texas](#), 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

Source of limits

Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for teachings of history and solid recognition of the basic values that underlie our society.

U.S.—[Moore v. City of East Cleveland, Ohio](#), 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Historical reference

Substantive due process, not expressly found in the text of the Federal Constitution, must be one that is fundamental, able to be recognized as such by reference to the teachings of history and the basic values that underlie our society and such historical reference is necessary because of the need for an objective standard so that judges may not elevate their purely personal political and social views to constitutional dignity merely by labelling them "fundamental."

U.S.—[Petrey v. Flaughner](#), 505 F. Supp. 1087 (E.D. Ky. 1981).

15 U.S.—[U.S. v. Quinones](#), 313 F.3d 49 (2d Cir. 2002).

16 U.S.—[Bove v. People of State of New York](#), 332 U.S. 784, 68 S. Ct. 28, 92 L. Ed. 367 (1947); [Fay v. People of State of N.Y.](#), 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947).

17 U.S.—[Bove v. People of State of New York](#), 332 U.S. 784, 68 S. Ct. 28, 92 L. Ed. 367 (1947); [Fay v. People of State of N.Y.](#), 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947).

18 Neb.—[Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.](#), 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

19 Ala.—[Alabama Republican Party v. McGinley](#), 893 So. 2d 337 (Ala. 2004).

Mont.—[Englin v. Board of County Com'rs](#), 2002 MT 115, 310 Mont. 1, 48 P.3d 39 (2002).

N.D.—[Ennis v. City of Ray](#), 1999 ND 104, 595 N.W.2d 305 (N.D. 1999).

Touchstone

The touchstone of substantive due process is the protection of the individual against arbitrary action of the government.

U.S.—[Remer v. Burlington Area School Dist.](#), 286 F.3d 1007, 163 Ed. Law Rep. 625 (7th Cir. 2002).

Mich.—[Bonner v. City of Brighton](#), 495 Mich. 209, 848 N.W.2d 380 (2014), *cert. denied*, 135 S. Ct. 230, 190 L. Ed. 2d 134 (2014).

W. Va.—[State ex rel. Bailey v. State Div. of Corrections](#), 213 W. Va. 563, 584 S.E.2d 197 (2003).

20 U.S.—[Remer v. Burlington Area School Dist.](#), 286 F.3d 1007, 163 Ed. Law Rep. 625 (7th Cir. 2002).

Iowa—[In re K.M.](#), 653 N.W.2d 602 (Iowa 2002) (holding modified on other grounds by, [In re P.L.x](#), 778 N.W.2d 33 (Iowa 2010)).

Member of executive branch

When the conduct of a member of the executive branch is at issue in a substantive due process challenge, only the most egregious official conduct can be said to be arbitrary in the constitutional sense.

U.S.—[Gedrich v. Fairfax County Dept. of Family Services](#), 282 F. Supp. 2d 439 (E.D. Va. 2003).

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Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 A.L.R.5th 1.

21 U.S.—[Remer v. Burlington Area School Dist.](#), 286 F.3d 1007, 163 Ed. Law Rep. 625 (7th Cir. 2002).

- 22 U.S.—*Curry v. McCanless*, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).
Chattels are not entitled to constitutional due process
 U.S.—*U.S. v. One Bally Sun Valley Pinball Mach.*, 340 F. Supp. 307 (W.D. La. 1972).
- 23 U.S.—*Bloom v. State of Ill.*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968).
- 24 U.S.—*Curry v. McCanless*, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).
- 25 U.S.—*O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980).
- 26 Ind.—*Osborn v. Review Bd. of Indiana Employment Sec. Division*, 178 Ind. App. 22, 381 N.E.2d 495 (1978).
Incidental hardship
 The concept of due process does not involve the notion that the citizen is entitled to a forthwith process or insurance against all incidental hardship pending the execution of a reasonably expeditious and adequate process.
 U.S.—*Burgess v. Roth*, 387 F. Supp. 1155 (E.D. Pa. 1975).
- 27 U.S.—*Poulos v. State of N.H.*, 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953); *Ownbey v. Morgan*, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921).
 Mich.—*Sullivan v. Graham*, 336 Mich. 65, 57 N.W.2d 447 (1953).
Public interest or concern
 A law is not unconstitutional merely because it results in financial injury to a citizen where it is reasonably necessary to preserve important public interests or because it preserves one interest over another, if there is preponderant public concern in the preservation of one over the other.
 U.S.—*Porter v. Shibe*, 158 F.2d 68 (C.C.A. 10th Cir. 1946).
- 28 U.S.—*Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).
- 29 N.Y.—*College Barn, Inc. v. State*, 60 Misc. 2d 715, 303 N.Y.S.2d 894 (Sup 1969), order aff'd, 25 N.Y.2d 657, 306 N.Y.S.2d 468, 254 N.E.2d 769 (1969).
Harm to citizen
 Conduct is not unconstitutional merely because it may proximately cause harm to a citizen; in the context of the Fifth Amendment, conduct is only unconstitutional if it violates the standard of care due a citizen under those circumstances.
 U.S.—*Beard v. Mitchell*, 604 F.2d 485, 4 Fed. R. Evid. Serv. 1234 (7th Cir. 1979).
Burdens of poor
 Not all burdens under which the poor labor because of their poverty constitute denials of due process of law.
 N.J.—*Puchalski v. New Jersey State Parole Bd.*, 104 N.J. Super. 294, 250 A.2d 19 (App. Div. 1969), aff'd, 55 N.J. 113, 259 A.2d 713 (1969).
- 30 U.S.—*Cloutier v. Town of Epping*, 547 F. Supp. 1232 (D.N.H. 1982), judgment aff'd, 714 F.2d 1184 (1st Cir. 1983).
Every injury
 The Federal Due Process Clause does not protect against every alleged injury at the hands of the State.
 U.S.—*Caso v. New York State Public High School Athletic Ass'n, Inc.*, 78 A.D.2d 41, 434 N.Y.S.2d 60 (4th Dep't 1980).
- 31 U.S.—*Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975).
 No guarantee against judicial error, see § 1866.
Decisions; determinations; performance
 (1) The Fourteenth Amendment does not guarantee that all decisions by state officials will be correct.
 U.S.—*Lavine v. Milne*, 424 U.S. 577, 96 S. Ct. 1010, 47 L. Ed. 2d 249 (1976).
 (2) Not every misapplication of law rises to the level of a violation of due process.
 U.S.—*Wheeler v. Schweiker*, 547 F. Supp. 599 (D. Vt. 1982), judgment aff'd in part, rev'd in part on other grounds, 719 F.2d 595 (2d Cir. 1983).
 (3) Due process does not serve as an assurance that officials and functionaries can never err in the performance of their responsibilities.
 U.S.—*Cloutier v. Town of Epping*, 547 F. Supp. 1232 (D.N.H. 1982), judgment aff'd, 714 F.2d 1184 (1st Cir. 1983).
Official impropriety
 Not every official impropriety gives rise to a finding that due process has been denied.
 U.S.—*Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977).

Nonperformance of discretionary act

The failure of a state official to perform a purely discretionary act is not a denial of due process absent some showing of arbitrariness or abuse of discretion.

U.S.—*Williams v. Patton*, 410 F. Supp. 1 (E.D. Pa. 1976).

Violation of state law

(1) A violation of state law does not involve a denial of substantive due process unless the violation is the result of arbitrary state action.

U.S.—*U.S. ex rel. Hoover v. Franzen*, 669 F.2d 433 (7th Cir. 1982).

(2) A violation of state law by a state official, without more, is not a violation of the federal right to procedural due process.

U.S.—*Miller v. Carson*, 563 F.2d 757 (5th Cir. 1977).

(3) A violation of a state statute does not in and of itself establish a constitutional violation.

U.S.—*Molgaard v. Town of Caledonia*, 527 F. Supp. 1073 (E.D. Wis. 1981), decision aff'd, 696 F.2d 58 (7th Cir. 1982).

Procedural requirements

A breach of state procedural requirements is not, in and of itself, a violation of the Due Process Clause.

U.S.—*Atencio v. Board of Educ. of Penasco Independent School Dist. No. 4*, 658 F.2d 774 (10th Cir. 1981).

32 U.S.—*Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

33 U.S.—*Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

34 Tex.—*District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 160 S.W.2d 915 (Comm'n App. 1942).

35 U.S.—*Pearson v. McGraw*, 308 U.S. 313, 60 S. Ct. 211, 84 L. Ed. 293 (1939); *Simon v. Craft*, 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165 (1901).

R.I.—*Mills v. Howard*, 109 R.I. 25, 280 A.2d 101 (1971).

Whole substance of proceeding

In reviewing state action in the area of procedural due process, federal courts must look to the whole substance of the proceeding not merely to its bare form, in determining whether the process at issue abides by the constitutional minimum of protection.

U.S.—*Buck v. Board of Ed. of City of New York*, 553 F.2d 315 (2d Cir. 1977).

Formal compliance; procedural regularity

Solicitude for securing justice embodied in the Due Process Clause is not satisfied by formal compliance or mere procedural regularity.

U.S.—*Carter v. People of State of Illinois*, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).

36 **Guaranty not merely directory**

The guaranty of due process is not merely directory to the legislature, binding its conscience only; rather, it constitutes a legal right, assertable in the courts, to be protected and preserved unless a contrary right asserted is superior.

N.M.—*State v. Henry*, 1933-NMSC-080, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933).

37 Fla.—*Stengel v. Crandon*, 156 Fla. 592, 23 So. 2d 835, 161 A.L.R. 1228 (1945).

All restraints not unconstitutional

The fact that a liberty cannot be inhibited without the process of law does not mean that all restraints on a liberty are unconstitutional.

U.S.—*U.S. v. First Nat. Bank of Cincinnati*, 329 F. Supp. 1251 (S.D. Ohio 1971).

38 Wyo.—*Application of Stone*, 77 Wyo. 1, 305 P.2d 777 (1957).

39 Cal.—*In re Moffett*, 19 Cal. App. 2d 7, 64 P.2d 1190 (4th Dist. 1937).

40 U.S.—*Addante v. Village of Elmwood Park*, 541 F. Supp. 497 (N.D. Ill. 1982).

41 Okla.—*Cook v. Parkinson*, 1942 OK 389, 191 Okla. 529, 131 P.2d 82 (1942).

Procedural or substantive due process

In order that the requirements of due process of law be satisfied, a litigant must be afforded procedural due process as well as substantive due process.

Ky.—*Kentucky Alcoholic Beverage Control Bd. v. Jacobs*, 269 S.W.2d 189 (Ky. 1954).

42 U.S.—*East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106, 8 A.L.R.2d 1219 (2d Cir. 1949).

Heavy burden

The burden of showing intentional and purposeful discrimination in the application of law against an individual to prove a denial of due process is a heavy one.

Tex.—[Armendariz v. State](#), 529 S.W.2d 525 (Tex. Crim. App. 1975).

U.S.—[Manley v. State of Georgia](#), 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

U.S.—[Baker-Chaput v. Cammett](#), 406 F. Supp. 1134 (D.N.H. 1976).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1864. Purpose of due process guaranty

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The purpose of the guaranty of due process is to prevent governmental encroachment against, or arbitrary invasion of, the life, liberty, or property of individuals, through executive, legislative, judicial, or administrative authority.

Broadly speaking, the purpose of the guaranty of due process is to prevent governmental encroachment against,¹ or arbitrary invasion of,² the life, liberty, or property of individuals through executive, legislative, judicial, or administrative authority.³ Additionally, the purpose of the guaranty is to prevent any encroachment on an acknowledged right of citizenship by the legislatures of the states,⁴ to secure, or protect the citizen, or individual, against arbitrary⁵ or oppressive⁶ action, or from the arbitrary exercise of the powers of government,⁷ unrestrained by the established principles of private rights and distributive justice.⁸

Furthermore, the purpose of the guaranty is to protect property from confiscation by legislative enactments, or from seizure, forfeiture, and destruction without a trial and conviction by the ordinary modes of judicial procedure,⁹ and to secure to all

persons equal and impartial justice,¹⁰ equal rights,¹¹ and the benefit of the general law.¹² However, due process of law does not require absolute equality,¹³ or precisely equal advantages,¹⁴ but only equality in the eyes of the law.¹⁵

The purpose of the due process provisions, as they relate to judicial procedure, is to insure fundamental fairness¹⁶ and adherence to fundamental principles of justice and fair play.¹⁷ Thus, the Due Process Clause is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances¹⁸ and requires state actions to be consistent with fundamental principles of liberty and justice.¹⁹ However, the due process provisions of a state constitution and of the Fourteenth Amendment are not designed to interfere with the public powers of the State,²⁰ and a legitimate public purpose may always be served without regard to the constitutional limitation of due process.²¹ Due process should not be employed to insure that an exercise of discretion is wise but only that it is not unreasonable, arbitrary, or capricious.²²

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Footnotes

- 1 Mo.—*Junkins v. Local Union No. 6313, Communication Workers of America, Congress of Indus. Organization*, 263 S.W.2d 337 (Mo. 1954).
As to deprivation of life, liberty, or property, generally, see §§ 1883 to 1908.
Foundation of individual freedom
Due process of law is the primary and indispensable foundation of individual freedom.
U.S.—*Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
- 2 Kan.—*Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).
- 3 Ill.—*Murphy v. Collins*, 20 Ill. App. 3d 181, 312 N.E.2d 772 (1st Dist. 1974).
Prevention of abuse of power
Due Process Clause of Fourteenth Amendment was intended to prevent government from abusing its power or employing it as instrument of oppression.
U.S.—*Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).
Administrative convenience
Mere administrative convenience is no justification for the deprivation of property without due process.
U.S.—*Remm v. Landrieu*, 418 F. Supp. 542 (E.D. La. 1976).
Concern for efficiency and efficacy
The Bill of Rights in general, and the Due Process Clause in particular, were designed to protect fragile values of vulnerable citizenry from overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
U.S.—*Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).
Federal agency
A federal agency may not, consistently with Fifth Amendment due process, do what a state is forbidden to do by Fourteenth Amendment due process.
U.S.—*Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969).
- 4 U.S.—*Burke v. Mathiasen's Tanker Industries, Inc.*, 393 F. Supp. 790 (E.D. Pa. 1975).
- 5 S.C.—*In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002).
W. Va.—*Major v. DeFrench*, 169 W. Va. 241, 286 S.E.2d 688 (1982).
Arbitrary act or action
(1) An arbitrary act is one done without any apparent reason therefor.
Cal.—*Verdugo Hills Hospital, Inc. v. Department of Health*, 88 Cal. App. 3d 957, 152 Cal. Rptr. 263 (2d Dist. 1979).
(2) An arbitrary action, in the due process sense, means an action that is willful and unreasonable, depending on will alone and not done according to reason or judgment.
Ill.—*Ashcraft v. Board of Ed. of Danville Community Consol. School Dist. No. 118 of Vermilion County*, 83 Ill. App. 3d 938, 39 Ill. Dec. 392, 404 N.E.2d 983 (4th Dist. 1980).
Substantive guaranties

Even when minimum requirements of procedural due process are met, basic substantive due process guaranties against arbitrary and capricious official action still apply.

Conn.—*Helm v. Welfare Commissioner*, 32 Conn. Supp. 595, 348 A.2d 317 (Super. Ct. Appellate Sess. 1975).

N.J.—*Washington Nat. Ins. Co. v. Board of Review of N. J. Unemployment Compensation Commission*, 1 N.J. 545, 64 A.2d 443 (1949).

U.S.—*Duncan v. State*, 152 U.S. 377, 14 S. Ct. 570, 38 L. Ed. 485 (1894).

N.C.—*Nantz v. Employment Sec. Commission*, 28 N.C. App. 626, 222 S.E.2d 474 (1976), judgment aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976).

Governmental edict

The exercise of power arbitrarily, without apparent authority, operates to create a governmental edict, violative of due process.

U.S.—*Solomon v. LaRose*, 335 F. Supp. 715 (D. Neb. 1971).

U.S.—*Twining v. State of N.J.*, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (overruled in part on other grounds by, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Ohio—*Hamilton v. Keiter*, 16 Ohio Misc. 260, 45 Ohio Op. 2d 285, 241 N.E.2d 296 (C.P. 1968).

Wyo.—*Pirie v. Kamps*, 68 Wyo. 83, 229 P.2d 927, 26 A.L.R.2d 647 (1951).

U.S.—*Chambers v. State of Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

Okla.—*Davis v. State*, 1966 OK CR 53, 413 P.2d 920 (Okla. Crim. App. 1966).

Impartial government

The federal sovereign, like the states, must govern impartially.

U.S.—*Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

Fifth and Fourteenth Amendments

The concept of equal justice under law is served by the Fifth Amendment's guaranty of due process as well as by the Equal Protection Clause of the Fourteenth Amendment.

U.S.—*Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

N.Y.—*People, on Complaint of McDonald, v. Simonian*, 173 Misc. 131, 18 N.Y.S.2d 371 (Sup 1940).

U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).

Wyo.—*Pirie v. Kamps*, 68 Wyo. 83, 229 P.2d 927, 26 A.L.R.2d 647 (1951).

U.S.—*Williams v. Wyrick*, 664 F.2d 193 (8th Cir. 1981).

Ill.—*People v. Cole*, 47 Ill. App. 3d 775, 6 Ill. Dec. 3, 362 N.E.2d 432 (4th Dist. 1977).

U.S.—*Williams v. Wyrick*, 664 F.2d 193 (8th Cir. 1981).

Assumption

The due process guaranty assumes that governments may recognize and act upon factual differences which exist between individuals, classes, and events.

Ill.—*People v. Cole*, 47 Ill. App. 3d 775, 6 Ill. Dec. 3, 362 N.E.2d 432 (4th Dist. 1977).

U.S.—*Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

Cal.—*White v. Board of Medical Quality Assurance*, 128 Cal. App. 3d 699, 180 Cal. Rptr. 516 (4th Dist. 1982).

Fundamental fairness as essence or touchstone of due process

N.C.—*Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E.2d 765 (1981), decision modified on other grounds, 306 N.C. 333, 293 S.E.2d 95 (1982).

Magnitude of error

To establish a denial of due process, the petitioner must prove that the error asserted was of such magnitude that it failed to afford him or her fundamental fairness which is the essence of due process.

U.S.—*Harris v. Wyrick*, 634 F.2d 1152 (8th Cir. 1980).

Burdens of litigation

The government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation.

U.S.—*Continental Can Co., U.S. A. v. Marshall*, 603 F.2d 590 (7th Cir. 1979).

Substantive due process academic

Since substantive due process is limited to a commitment to fundamental fairness, substantive due process is generally academic because application of any regulation which is fundamentally unfair also would not withstand procedural analysis.

U.S.—*Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977).

17 N.C.—*Nantz v. Employment Sec. Commission*, 28 N.C. App. 626, 222 S.E.2d 474 (1976), judgment aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976).

Wis.—*Chicago & N.W.R.R. v. Labor and Industry Review Commission*, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979), decision aff'd, 98 Wis. 2d 592, 297 N.W.2d 819 (1980).

Safeguards; sense of fair play

(1) The basic concepts of fair play are inexorable safeguards for due process.

U.S.—*Garvey v. Freeman*, 397 F.2d 600 (10th Cir. 1968).

(2) Due process is denied where the procedure tends to shock the sense of fair play.

U.S.—*Howard v. U.S.*, 372 F.2d 294 (9th Cir. 1967).

18 U.S.—*Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975).

Universal sense of justice

Generally, a denial of due process is a denial of fundamental fairness, shocking to a universal sense of justice.

Ariz.—*Crouch v. Justice of Peace Court of Sixth Precinct*, 7 Ariz. App. 460, 440 P.2d 1000 (1968).

Limitation on expansion

A proper reverence for due process must not be permitted to lead to such an indefinable expansion of the concept that its limitless bounds are in themselves unfair to a legitimate interest.

N.J.—*State v. Laganella*, 144 N.J. Super. 268, 365 A.2d 224 (App. Div. 1976).

19 U.S.—*Sterling v. Maggio*, 505 F. Supp. 1111 (M.D. La. 1981).

20 La.—*Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 209 La. 737, 25 So. 2d 527 (1946), judgment aff'd, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093 (1947).

21 N.Y.—*People v. Arlen Service Stations*, 284 N.Y. 340, 31 N.E.2d 184 (1940) (rejected on other grounds by, *State v. Redman Petroleum Corp.*, 77 Nev. 163, 360 P.2d 842 (1961)).

22 U.S.—*Chung v. Park*, 514 F.2d 382 (3d Cir. 1975).

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16C C.J.S. Constitutional Law § 1865

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1865. Rights, interests, or benefits protected by due process guaranty

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3869 to 3874

The protection of the guaranty of due process of law extends to rights in the broadest sense of the term, and in particular, to those rights which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept of ordered liberty.

The protection of the guaranty of due process of law extends to rights in the broadest sense of the term,¹ and in particular, to those rights which are so rooted in the traditions and conscience of our people as to be ranked as fundamental,² or which are implicit in the concept of ordered liberty³ such that neither liberty nor justice would exist if they were sacrificed.⁴ Nonetheless, it has also been held that the rights protected are private⁵ or personal⁶ rights.

In any event, due process can be invoked only when there are constitutionally protected rights, interests, or benefits to be defended.⁷ Thus, in a broad sense, the constitutional guaranty of due process of law has no application if the deprivation of life, liberty, or property is not involved.⁸ More particularly, only if a state deprives any person of a right or denies him or her

enforcement of a right, interest, or benefit protected by the Due Process Clause of the Fourteenth Amendment can its protection be invoked.⁹

However, in order to receive due process protection generally, the interests in dispute need not reach the level of the traditional constitutional "right,"¹⁰ and reliance on the so-called "right-privilege distinction" in assessing whether a legitimate entitlement to due process protection is implicated in a given case has been rejected or repudiated by the courts.¹¹ Accordingly, the constitutional guaranty of due process applies to both rights and privileges.¹²

Indeed, it has been stated that the word more favored than "right" or "privilege" is "interest."¹³ However, not all interests are entitled to due process protection¹⁴ and whether an interest subject to due process exists is determined by an examination of the nature of the interest at stake.¹⁵ Moreover, it is the nature rather than the weight of the interest that is critical under the Due Process Clause.¹⁶ Otherwise stated, it is not the weight but the nature of the interest at stake that determines whether due process applies.¹⁷ Furthermore, whether a deprivation of due process has occurred is not dependent upon the subjective feelings or beliefs of the plaintiff, and, in order to properly maintain a due process claim, the plaintiff must have been, in fact, deprived of a constitutionally protected liberty or property interest.¹⁸

Generally, the Due Process Clause extends protection to those interests which rise to the level of a legitimate claim of entitlement,¹⁹ and the source of legitimate claims of entitlement is not the United States Constitution but rather the acts of the sovereign, state or federal, manifested in legislation, rules, or customs.²⁰ Thus, while the Due Process Clause does not convert every state statutory right into a constitutional entitlement,²¹ protectible interests for due process purposes may be created and their dimensions defined by existing rules or understandings that stem from an independent source,²² such as state²³ or federal²⁴ law, and the nature of such an interest is determined by the statutes conferring the benefit and by the regulations and provisions under which it is administered.²⁵ The question of whether an asserted interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause is indisputably a constitutional question governed by federal law.²⁶ However, where the claimed interest is rooted in state law, the court looks to the particular state statute, contract, or regulation that purports to establish the asserted entitlement in order to assess the parameters and the strength of the alleged interest to determine if due process protection applies.²⁷

Where a statute purports to confer a benefit on an individual and in so doing creates a reasonable expectancy that the benefit will be of a continuing nature, any attempt to deprive the individual of the benefit must be accompanied by due process.²⁸ On the other hand, a statute which confers plenary jurisdiction by administering officials to grant or deny a benefit creates no justifiable expectation that the benefit will be received at all and hence cannot form the predicate for invoking the protection of the Due Process Clause.²⁹ Similarly, if the continuation of the benefit turns on the will of the provider,³⁰ as where it is "terminable at will" by governmental authorities,³¹ a party has no legitimate expectation of the benefit's continuation,³² and due process protections are unavailable. A person cannot be deemed entitled to something, for purpose of determining whether person has protected due process interest, when the identity of the alleged entitlement is vague.³³

The constitution is not implicated where a person is deprived of something for which he or she has no more than an abstract need or desire,³⁴ and a mere³⁵ or unilateral³⁶ hope or expectation is not entitled to protection under the Due Process Clause. Thus, to generate a due process claim, a party must demonstrate that it holds an interest arising out of a law or understanding with the State³⁷ that transcends an abstract need or desire³⁸ or a unilateral hope or expectation³⁹ and qualifies as a legitimate claim of entitlement.⁴⁰ However, where the administrative scheme does not require a certain outcome but merely authorizes particular

actions and remedies, the scheme does not create entitlements that receive constitutional protection under the Fourteenth Amendment.⁴¹

In any event, the rights so protected are not fixed as of any one time.⁴² A plaintiff has no vested right protected by the Due Process Clause in the mere continuance of a law.⁴³ Although the guaranty confers no new rights on the citizen, but only secures those recognized as belonging to him or her when it was incorporated in the Federal Constitution,⁴⁴ the Fourteenth Amendment applies to any taking of property after its adoption, although under a statute in force before such time.⁴⁵

Federal regulation of future action based on rights previously acquired by the person regulated is not prohibited by the United States Constitution.⁴⁶ Furthermore, as long as the Federal Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.⁴⁷ Natural civil and political rights are within the constitutional protection,⁴⁸ but it is the essential, and not whimsical, rights that are so protected.⁴⁹ The guaranty is designed for the protection of substantial rights.⁵⁰ Furthermore, the scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Federal Constitution.⁵¹

Failure to protect against private violence.

The failure to protect an individual against private violence does not constitute a violation of the Due Process Clause.⁵²

Right to pursue trade, occupation, business, or profession.

The right to pursue a trade, occupation, business, or profession constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the state and federal constitutions.⁵³

Human dignity.

The right to human dignity does not fall under the protection of the Due Process Clause.⁵⁴

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Footnotes

- 1 Cal.—*Wissner v. Wissner*, 89 Cal. App. 2d 759, 201 P.2d 837 (3d Dist. 1949), judgment rev'd on other grounds, 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950).
All character of rights
W. Va.—*Harloe v. Harloe*, 129 W. Va. 1, 38 S.E.2d 362 (1946).
- 2 U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
Pa.—*Com. v. Bomar*, 104 A.3d 1179 (Pa. 2014).
Kan.—*State v. Turner*, 300 Kan. 662, 333 P.3d 155 (2014).
Miss.—*Means v. State*, 43 So. 3d 438 (Miss. 2010).
Heightened protection
Due process provides heightened protection against government interference with fundamental rights and liberty interests.
U.S.—*Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).
- 3 U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
Alaska—*Treacy v. Municipality of Anchorage*, 91 P.3d 252 (Alaska 2004).

Idaho—*State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010).
 Iowa—*Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010).
 Mass.—*Paquette v. Com.*, 440 Mass. 121, 795 N.E.2d 521 (2003).
 Nev.—*State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 129 Nev. Adv. Op. No. 52 (Nev. 2013).
 N.M.—*Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, 306 P.3d 457 (N.M. 2013).
 N.C.—*Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008).
 Wis.—*In re Termination of Parental Rights to Diana P.*, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344 (2005).

4 Idaho—*State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010).
 Mass.—*Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E.2d 377 (2011).
 Mo.—*Bromwell v. Nixon*, 361 S.W.3d 393 (Mo. 2012).
 N.C.—*Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008).
 R.I.—*State v. Germane*, 971 A.2d 555 (R.I. 2009).
 5 Mass.—*Morrissey v. State Ballot Law Commission*, 312 Mass. 121, 43 N.E.2d 385 (1942).
 6 U.S.—*Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948).
 7 U.S.—*Hampton v. U. S.*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976).
 Nev.—*Mosley v. Nevada Com'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (2001).
 Pa.—*Khan v. State Bd. of Auctioneer Examiners*, 577 Pa. 166, 842 A.2d 936 (2004).

Ability to pay

While there are many "rights" which may be denied to those without the means to pay for them, rights fundamental to due process must be accorded irrespective of the ability to pay.

U.S.—*Bentley v. Crist*, 469 F.2d 854 (9th Cir. 1972).

Guilt of intentional misconduct

The right to due process is a right possessed by every person who faces the loss or impairment of a protected interest whether or not the person facing the loss is guilty of some intentional misconduct.

U.S.—*Bradford v. Edelstein*, 467 F. Supp. 1361 (S.D. Tex. 1979).

8 U.S.—*O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980).
 Tenn.—*Willis v. Tennessee Dept. of Correction*, 113 S.W.3d 706 (Tenn. 2003).

Threshold inquiry

Me.—*Sparks v. Sparks*, 2013 ME 41, 65 A.3d 1223 (Me. 2013).

9 U.S.—*Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Me.—*Green v. Commissioner of Mental Health and Mental Retardation*, 2000 ME 92, 750 A.2d 1265 (Me. 2000).

Determination of scope

It is the interest which has allegedly been infringed, not the relative degree of infringement or state of mind of the defendants, that is crucial in determining the scope of the Fourteenth Amendment.

U.S.—*Reilly v. Leonard*, 459 F. Supp. 291 (D. Conn. 1978).

Right given by legislature

When a right is given by the state legislature, even though it is not constitutionally protected, the arbitrary denial of that right is violative of the Fourteenth Amendment.

U.S.—*U. S. ex rel. Curtis v. People of State of Ill.*, 521 F.2d 717 (7th Cir. 1975).

State laws

The laws of a state come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights.

U.S.—*American Land Co. v. Zeiss*, 219 U.S. 47, 31 S. Ct. 200, 55 L. Ed. 82 (1911).

Denial of state right

The guaranty of due process of law contained in the Fourteenth Amendment is not violated because a state incorrectly denies a person a state right but by so abrogating a state right does not abrogate a federal right.

U.S.—*Procella v. Beto*, 319 F. Supp. 662 (S.D. Tex. 1970).

Fundamental right or interest

(1) The first step in a "fundamental right" analysis with respect to a due process challenge is to engage in a careful description of the asserted right.

D.C.—*District of Columbia v. Jerry M.*, 717 A.2d 866 (D.C. 1998).

(2) A "fundamental right or interest," for purposes of substantive due process, is a right or interest that is explicitly or implicitly guaranteed by the constitution.

Miss.—*Harris v. Mississippi Valley State University*, 873 So. 2d 970, 188 Ed. Law Rep. 562 (Miss. 2004).

N.J.—*State v. Senno*, 79 N.J. 216, 398 A.2d 873 (1979).

10 U.S.—*Keller v. Kate Maremount Foundation*, 365 F. Supp. 798 (N.D. Cal. 1972), judgment aff'd, 504 F.2d 483 (9th Cir. 1974).

As to nature of rights protected, generally, see § 721.

As to vested rights, generally, see §§ 472 to 505.

Rights in constitution

The category of rights and interests to which due process guaranties must be accorded is not limited to those fundamental rights set forth in the Federal Constitution.

U.S.—*Shaffer v. Board of School Directors of Albert Gallatin Area School Dist.*, 522 F. Supp. 1138 (W.D. Pa. 1981), order rev'd on other grounds, 687 F.2d 718, 6 Ed. Law Rep. 487 (3d Cir. 1982).

11 U.S.—*LaBauve v. Louisiana Wildlife & Fisheries Commission*, 444 F. Supp. 1370 (E.D. La. 1978).

Governmental benefit

The distinction between a right and privilege is no longer an acceptable basis for determining whether the Due Process Clause applies to a governmental benefit.

U.S.—*Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977).

Court's focus; dispositive factor

(1) The right to procedural due process turns upon whether there is an infringement of "liberty," not upon whether the deprivation involves a loss of "privilege" rather than "right."

U.S.—*Milano v. Jett*, 424 F. Supp. 1208 (C.D. Cal. 1976).

(2) The right-privilege dichotomy of common law is not a relevant factor in gauging whether a threatened interest is fit for federal constitutional protection.

Okla.—*Phillips v. Williams*, 1980 OK 25, 608 P.2d 1131 (Okla. 1980).

12 U.S.—*Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975).

Label; fictions

(1) States may not avoid the rigors of due process by labelling an action which has serious and onerous consequences as the withdrawal of a privilege rather than a right.

U.S.—*Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

(2) Private interests are to be evaluated under the Due Process Clause not in terms of labels or fictions, but in terms of their true significance and worth.

U.S.—*Graham v. Knutzen*, 351 F. Supp. 642 (D. Neb. 1972), opinion supplemented on other grounds, 362 F. Supp. 881 (D. Neb. 1973).

Withdrawing, dispensing, or revoking privilege

(1) Once a governmental body confers a privilege, it cannot withdraw it or dispense it arbitrarily and irrationally.

U.S.—*Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974).

(2) Due process requires that the government abide by basic principles of fairness when dispensing, or revoking, a privilege.

U.S.—*Hester v. Craven*, 322 F. Supp. 1256 (C.D. Cal. 1971).

Loss of privilege once granted

For purposes of determining due process rights, the loss of a privilege once granted is clearly different from the denial of a privilege that has never been given.

N.H.—*Stone v. Perrin*, 118 N.H. 109, 382 A.2d 1112 (1978).

13 U.S.—*Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975).

14 U.S.—*Feinberg v. Federal Deposit Ins. Corp.*, 420 F. Supp. 109 (D.D.C. 1976).

Range not infinite

The range of interests protected by procedural due process is not infinite.

Iowa—*Wedergren v. Board of Directors*, 307 N.W.2d 12 (Iowa 1981).

Interest in procedure

(1) The interest in procedure itself is not an interest protected by the Fourteenth Amendment.

Me.—*Botting v. Department of Behavioral and Developmental Services*, 2003 ME 152, 838 A.2d 1168 (Me. 2003).

(2) One cannot have a constitutionally protected interest solely in state law procedure, but, rather, a separate property interest must also be present.

U.S.—*Molgaard v. Town of Caledonia*, 527 F. Supp. 1073 (E.D. Wis. 1981), decision aff'd, 696 F.2d 58 (7th Cir. 1982).

15

Iowa—*State v. Cronkhite*, 613 N.W.2d 664 (Iowa 2000).

Ohio—*Walton v. Montgomery County Welfare Dept.*, 69 Ohio St. 2d 58, 23 Ohio Op. 3d 93, 430 N.E.2d 930 (1982).

Novel context

When the Due Process Clause is invoked in a novel context, the court must begin an inquiry to determine the precise nature of the private interest that is threatened by the State, and only after that interest has been identified can the court properly evaluate the adequacy of the State's process.

U.S.—*Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

16

U.S.—*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

17

U.S.—*Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976).

Mass.—*Querubin v. Com.*, 440 Mass. 108, 795 N.E.2d 534 (2003).

Vt.—*Hegarty v. Addison County Humane Soc.*, 176 Vt. 405, 2004 VT 33, 848 A.2d 1139 (2004).

As to weight of interest at stake as determinative of what process is due, see § 1867.

Size of interest

The size of the interest at stake does not determine whether due process attaches to adjudications concerning such interest, but the question is rather the type of interest involved and whether it can properly be classified as a liberty or property interest.

U.S.—*Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980).

Nature of harm

The appropriate procedural requirements are dictated by the nature of the interest, not the nature of the harm flowing from a deprivation of that interest.

U.S.—*Premachandra v. Mitts*, 509 F. Supp. 424 (E.D. Mo. 1981).

Severity of deprivation; intention

The court need not, in addition to determining the type of interest involved, weigh the severity of the deprivation or characterize the defendant's intention in order to decide whether the Due Process Clause is applicable.

U.S.—*Reilly v. Leonard*, 459 F. Supp. 291 (D. Conn. 1978).

18

U.S.—*Tigrett v. Rector and Visitors of University of Virginia*, 290 F.3d 620, 165 Ed. Law Rep. 86 (4th Cir. 2002).

19

U.S.—*Walsh v. Louisiana High School Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980).

Conn.—*Columbia Air Services, Inc. v. Department of Transp.*, 293 Conn. 342, 977 A.2d 636 (2009).

D.C.—*Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

Haw.—*In re "B" Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Haw. 228, 287 P.3d 129 (2012), reconsideration dismissed, 2014 WL 4399531 (Haw. 2014).

Kan.—*Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 291 P.3d 1056 (2013).

Ohio—*Cleveland Constr., Inc. v. Cincinnati*, 118 Ohio St. 3d 283, 2008-Ohio-2337, 888 N.E.2d 1068 (2008).

S.D.—*Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905 (S.D. 2011).

Wash.—*Durland v. San Juan County*, 182 Wash. 2d 55, 340 P.3d 191 (2014).

Purpose of process

The process is not an end in itself; its constitutional purpose is to protect a substantive interest to which an individual has a legitimate claim of entitlement.

U.S.—*Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

20

U.S.—*Brede v. Director for Dept. of Health for State of Hawaii*, 616 F.2d 407 (9th Cir. 1980).

Existence of underlying right

A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of a parent right; however, an underlying right must have come into existence before it can trigger due process protection.

U.S.—*Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Federal statutory law

An interest protected by the guaranty of procedural due process need not be grounded in federal statutory law.

U.S.—[Young v. U.S.](#), 498 F.2d 1211 (5th Cir. 1974).

State statutes; decisional law; rules or understandings

(1) Protectible interests for due process consideration are not created by the Federal Constitution; rather, they are created by rules or understandings that stem from an independent source, such as state law.

U.S.—[Baker v. Cincinnati Metropolitan Housing Authority](#), 490 F. Supp. 520 (S.D. Ohio 1980), judgment aff'd, 675 F.2d 836 (6th Cir. 1982).

Conn.—[Worsham v. Greifenberger](#), 242 Conn. 432, 698 A.2d 867 (1997).

(2) One has a legitimate claim of entitlement, for purposes of due process protection, to a benefit that is originated and defined in state law, and the benefit can have its origin in either the decisional law of the State or its statutes.

Ill.—[I. Erlichman Co., Inc. v. Illinois Commerce Commission](#), 92 Ill. App. 3d 1091, 48 Ill. Dec. 448, 416 N.E.2d 721 (3d Dist. 1981).

(3) Interests protected by due process are not always created by the Federal Constitution, but, rather, they are often created and their dimensions defined by some independent source which frequently consists of a state statute or rule entitling a person to certain benefits.

Okla.—[Phillips v. Williams](#), 1980 OK 25, 608 P.2d 1131 (Okla. 1980).

U.S.—[Vruno v. Schwarzwald](#), 600 F.2d 124 (8th Cir. 1979).

U.S.—[Grossman v. Axelrod](#), 646 F.2d 768 (2d Cir. 1981).

Bestowal of entitlement

A statute that bestows an "entitlement" must do so in accordance with the dictates of the Due Process Clause.

U.S.—[Ralpho v. Bell](#), 569 F.2d 607 (D.C. Cir. 1977).

Official policies or practices

The predicate necessary to trigger the Due Process Clause is not restricted to statutorily created rights; it also may be found in official policies or practices.

U.S.—[Durso v. Rowe](#), 579 F.2d 1365 (7th Cir. 1978).

Fla.—[Crocker v. Pleasant](#), 778 So. 2d 978 (Fla. 2001).

Miss.—[Bond v. Marion County Bd. of Sup'rs](#), 807 So. 2d 1208 (Miss. 2001).

Definition of eligibility for entitlement

State laws defining eligibility for a "statutory entitlement" are subject to the requirement of the Fourteenth Amendment that eligibility not be limited in any way that works invidious discrimination or constitutes a denial of due process.

Pa.—[O'Leary v. Wisecup](#), 26 Pa. Commw. 538, 364 A.2d 770 (1976) (disapproved of on other grounds by, [Com. v. Kerstetter](#), 94 A.3d 991, 306 Ed. Law Rep. 891 (Pa. 2014)).

U.S.—[Johnson v. Brelje](#), 482 F. Supp. 125 (N.D. Ill. 1979).

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[Due process rights of applicants for low income housing assistance benefits under sec. 8 of Housing Act of 1937, as amended \(42 U.S.C.A. sec. 1437f\), 66 A.L.R. Fed. 721.](#)

U.S.—[Patternmakers League of North America v. Campbell](#), 619 F.2d 826 (9th Cir. 1980).

Regulations contrasted

State regulations which impose limits on state authority or confer a substantive right create interests protected by due process; in contrast, regulations which merely establish procedures by which a decision maker is to exercise his or her authority give rise to no due process protection.

Wash.—[Punton v. City of Seattle Public Safety Com'n](#), 32 Wash. App. 959, 650 P.2d 1138 (Div. 1 1982) (overruled on other grounds by, [Danielson v. City of Seattle](#), 108 Wash. 2d 788, 742 P.2d 717 (1987)).

U.S.—[Sealed v. Sealed](#), 332 F.3d 51 (2d Cir. 2003), certified question answered on other grounds, 272 Conn. 734, 865 A.2d 428 (2005).

Wyo.—[City Council of Laramie v. Kreiling](#), 911 P.2d 1037 (Wyo. 1996).

U.S.—[Sealed v. Sealed](#), 332 F.3d 51 (2d Cir. 2003), certified question answered on other grounds, 272 Conn. 734, 865 A.2d 428 (2005).

U.S.—[White v. Keller](#), 438 F. Supp. 110 (D. Md. 1977), judgment aff'd, 588 F.2d 913 (4th Cir. 1978).

Benefit as right or privilege

The availability of constitutional protection of procedural due process does not depend upon whether a benefit is characterized as a right or as a privilege.

Cal.—[Garnel v. Bunzel](#), 68 Cal. App. 3d 999, 137 Cal. Rptr. 627 (1st Dist. 1977).

Cause or criteria for termination

(1) An entitlement subject to procedural due process protections may be created if a position or benefit continues absent cause for termination.

U.S.—*Williams v. U.S.*, 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

(2) If the interest one seeks to protect cannot be terminated except based on certain criteria, then that interest may be encompassed by the Fourteenth Amendment.

U.S.—*Local 736, Williamsport Firefighters v. City of Williamsport*, 470 F. Supp. 344 (M.D. Pa. 1979), *aff'd*, 601 F.2d 575 (3d Cir. 1979).

Lack of safeguards

Considerations of due process attach when a state endeavors to provide certain benefits but does not accompany them with appropriate procedural safeguards.

U.S.—*Crawford v. Short*, 387 F. Supp. 282 (S.D. Tex. 1975).

Proper analysis

When a person is deprived of statutorily conferred benefit, a due process analysis must start not with a judicial attempt to decide whether the statute has created an "entitlement" that can be defined as "liberty" or "property," but with an assessment of what procedural protection is constitutionally required in light of the governmental and private interests at stake.

Cal.—*People v. Rocha*, 135 Cal. App. 3d 590, 186 Cal. Rptr. 132 (5th Dist. 1982).

U.S.—*Rowe v. Fauver*, 533 F. Supp. 1239 (D.N.J. 1982).

Discretion

A benefit is not a protected entitlement, for due process purposes, if government officials may grant or deny it in their discretion.

U.S.—*Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).

U.S.—*Williams v. U.S.*, 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

U.S.—*Local 736, Williamsport Firefighters v. City of Williamsport*, 470 F. Supp. 344 (M.D. Pa. 1979), *aff'd*, 601 F.2d 575 (3d Cir. 1979).

U.S.—*Williams v. U.S.*, 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

U.S.—*Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).

La.—*Richey v. Hunter*, 407 So. 2d 427 (La. Ct. App. 1st Cir. 1981).

Kan.—*Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

Wash.—*Willoughby v. Department of Labor and Industries of the State of Wash.*, 147 Wash. 2d 725, 57 P.3d 611 (2002).

U.S.—*Winkler v. DeKalb County*, 648 F.2d 411 (5th Cir. 1981).

Tex.—*Ex parte Montgomery*, 894 S.W.2d 324 (Tex. Crim. App. 1995).

One-sided expectance

S.D.—*Bergee v. South Dakota Bd. of Pardons and Paroles*, 2000 SD 35, 608 N.W.2d 636 (S.D. 2000).

U.S.—*Guerra v. Guajardo*, 466 F. Supp. 1046 (S.D. Tex. 1978), *aff'd*, 597 F.2d 769 (5th Cir. 1979).

Ariz.—*Banks v. Arizona State Bd. of Pardons & Paroles*, 129 Ariz. 199, 629 P.2d 1035 (Ct. App. Div. 1 1981).

Iowa—*State v. Cronkhite*, 613 N.W.2d 664 (Iowa 2000).

Iowa—*State v. Cronkhite*, 613 N.W.2d 664 (Iowa 2000).

Tex.—*Ex parte Montgomery*, 894 S.W.2d 324 (Tex. Crim. App. 1995).

Mutually recognized entitlement

While a unilateral expectation of a benefit does not rise to the level of a protected interest, a mutually recognized entitlement will receive constitutional protection.

U.S.—*Winkler v. DeKalb County*, 648 F.2d 411 (5th Cir. 1981).

Ga.—*Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275 (1996).

Tex.—*Ex parte Montgomery*, 894 S.W.2d 324 (Tex. Crim. App. 1995).

Deprivation of entitlement

Procedural due process does not attach unless one can demonstrate that he or she is being deprived of an "entitlement" by state action.

Ill.—*Peabody Coal Co. v. Illinois Pollution Control Bd.*, 36 Ill. App. 3d 5, 344 N.E.2d 279 (5th Dist. 1976).

Preexisting entitlements

The evaluation of whether a right has vested is important for claims under the Due Process Clause, which solely protects preexisting entitlements.

U.S.—*Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

41 U.S.—*Sealed v. Sealed*, 332 F.3d 51 (2d Cir. 2003), certified question answered on other grounds, 272 Conn. 734, 865 A.2d 428 (2005).

42 U.S.—*Wolf v. People of the State of Colo.*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (overruled on other grounds by, *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)).

No permanent catalogue

Due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights.

Md.—*Campbell v. State*, 37 Md. App. 89, 376 A.2d 866 (1977).

43 Ill.—*Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 238 Ill. Dec. 30, 710 N.E.2d 827 (1999).

44 U.S.—*Gobitis v. Minersville School Dist.*, 21 F. Supp. 581 (E.D. Pa. 1937).

Common-law rights preserved

U.S.—*Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369 (5th Cir. 1953).

45 U.S.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, 12 S. Ct. 173, 35 L. Ed. 1004 (1891).

46 U.S.—*Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958); *Fleming v. Rhodes*, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947).

47 U.S.—*Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958).

Rights acquired by judgment have no different standing

U.S.—*Fleming v. Rhodes*, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947).

48 N.Y.—*People v. McClean*, 167 Misc. 40, 3 N.Y.S.2d 314 (N.Y. City Ct. 1938).

49 N.Y.—*People v. McClean*, 167 Misc. 40, 3 N.Y.S.2d 314 (N.Y. City Ct. 1938).

50 U.S.—*Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949); *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).

Mere afterthoughts

Due process of law is not concerned with mere afterthoughts.

U.S.—*Helis v. Ward*, 308 U.S. 365, 60 S. Ct. 283, 84 L. Ed. 327 (1939).

51 U.S.—*Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

52 U.S.—*DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

Undercover officer killed in sting operation

Police officials who assigned a police officer to an undercover sting operation designed to catch the robbers of pizza delivery drivers did not owe an affirmative duty under the substantive Due Process Clause to protect the officer because their actions or omissions allegedly created the danger into which he was placed and could not be held liable when the officer was fatally shot.

U.S.—*Rutherford v. City of Newport News, Va.*, 919 F. Supp. 885 (E.D. Va. 1996), *aff'd*, 107 F.3d 867 (4th Cir. 1997).

High school student

The town, school officials, and municipal officials did not have a special relationship with a student who was stabbed to death at school, and thus, the officials did not have an affirmative duty under the Due Process Clause to protect the student from attack by three private actors, even though the officials may have been aware of the danger to the student on the day he was killed at the school, where the 16-year-old student was not compelled to attend school.

Mass.—*Brum v. Town of Dartmouth*, 428 Mass. 684, 704 N.E.2d 1147, 131 Ed. Law Rep. 829 (1999).

53 Ill.—*Alarm Detection Systems, Inc. v. Village of Hinsdale*, 326 Ill. App. 3d 372, 260 Ill. Dec. 599, 761 N.E.2d 782 (2d Dist. 2001).

54 U.S.—*Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848 (W.D. Mich. 2004).

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16C C.J.S. Constitutional Law § 1866

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1866. No due process guarantee against judicial error

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867, 3887, 4008

The constitutional guaranty of due process of law does not guarantee against judicial error, and due process is not involved where the question is the validity of the judgment.

Due process of law does not guarantee against judicial error,¹ and while due process applies to the construction of statutes by the courts,² the mere erroneous construction of statutes does not constitute a denial of due process.³ Furthermore, due process does not provide any guaranty against unjust⁴ or erroneous⁵ decisions, or assure uniformity of judicial decisions,⁶ or guarantee any particular decision.⁷

Due process is not a guaranty that every court ruling shall be correct⁸ or that every decision reached will be factual or just,⁹ but it is a guaranty that the fundamental principles of justice shall not be violated¹⁰ and that a decision will be reached by processes which are fair.¹¹ Accordingly, the constitutional question of due process of law is not involved where the question is the validity of the judgment.¹² Since it is the deprivation of due process that is prohibited by the Fifth Amendment, and not the opportunity to abuse due process,¹³ a court is not at liberty to assume that the officers intrusted with the duty of administering a law will

violate their trust or their statutory duty.¹⁴ A misapprehension by a litigant of the steps which its best interests require during a trial is not a ground for interference by the court as a denial of constitutional rights.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Mere error of state law is not a denial of due process. U.S.C.A. Const.Amend. 14. *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).

Entry of judgment on a motion never made, never served upon the opposing party, and never noticed for hearing patently violates due process. U.S. Const. Amend. 14. *George v. Gilbert*, 268 So. 3d 780 (Fla. 4th DCA 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 309 U.S. 30, 60 S. Ct. 411, 84 L. Ed. 563 (1940).
N.Y.—*Young v. City of Binghamton*, 112 Misc. 2d 1017, 447 N.Y.S.2d 1017 (Sup 1982).
Judgment error
An error in judgment after a full hearing does not constitute a denial of due process.
U.S.—*Corrigan v. Buckley*, 271 U.S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926).
Exercise of discretion
Not every abuse of discretion rises to the level of a due process violation, and it is only when an abuse of discretion is such that it consists of either a total failure to consider an application as required by law or rendering a decision on a ground which infringes on otherwise constitutionally protected areas, such as race and religion, that the court must intercede and secure due process of law.
U.S.—*U. S. ex rel. Cameron v. People of State of N. Y.*, 383 F. Supp. 182 (E.D. N.Y. 1974).
- 2 Cal.—*People v. Sobiek*, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, 82 A.L.R.3d 804 (1st Dist. 1973).
Retroactive application
If the judicial construction of a statute to conform to the constitutional standards is foreseeable, that construction may be applied retroactively without violating due process guarantees; the test of such foreseeability is whether it was obvious that the statute would receive the particular construction.
Del.—*State v. Colasuonno*, 432 A.2d 334 (Del. Super. Ct. 1981).
- 3 U.S.—*Neblett v. Carpenter*, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182 (1938).
Cal.—*Melancon v. Superior Court In and For Los Angeles County*, 42 Cal. 2d 698, 268 P.2d 1050 (1954).
- 4 Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).
- 5 U.S.—*Watson v. Kenlick Coal Co.*, 365 F. Supp. 456 (E.D. Ky. 1973), judgment aff'd, 498 F.2d 1183 (6th Cir. 1974).
Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).
Mere error of state law not a denial of due process
U.S.—*Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).
Overruling decisions; disapproving dicta
(1) Judicial decisions may be overruled and dicta disapproved without violating the Due Process Clause.
Cal.—*In re Los Angeles County Pioneer Soc.*, 40 Cal. 2d 852, 257 P.2d 1 (1953).
(2) To avert injustice or hardship, the State may say that decisions of its highest court, although later overruled, are law none the less for intermediate transactions.

U.S.—*Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).

6 Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).

Appellate inconsistency

Neither state appellate inconsistency nor the lack of uniformity in judicial decisions generally violates due process.

U.S.—*Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980).

Operation of precedent

(1) The Federal Constitution does not prevent a state, in defining the limits of adherence to precedent, from choosing between the principle of forward operation of a new decision and that of relation backward.

U.S.—*Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).

Wis.—*Dupuis v. General Cas. Co. of Wis.*, 36 Wis. 2d 42, 152 N.W.2d 884 (1967).

(2) The retroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe rights secured by the Due Process Clause.

U.S.—*Sewell Coal Co. v. Federal Mine Safety & Health Review Com'n*, 686 F.2d 1066 (4th Cir. 1982).

(3) The prospective application of a decision does not violate the due process rights of persons affected previous to the declaration.

S.D.—*Fisher v. Sears, Roebuck & Co.*, 88 S.D. 1, 214 N.W.2d 85 (1974).

7 Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).

Foreseeability; acceptance

(1) The Due Process Clause does not protect citizens against judicial decisions that they consider unforeseeable, nor does it assure that litigants will always receive judgments on their lawsuits that they can accept with equanimity.

U.S.—*Franklin v. First Money, Inc.*, 427 F. Supp. 66 (E.D. La. 1976), judgment aff'd, 599 F.2d 615 (5th Cir. 1979).

(2) Due process of law does not mean that a litigant need be satisfied with the result.

Md.—*Bugg v. Maryland Transp. Authority*, 31 Md. App. 622, 358 A.2d 562 (1976).

8 Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).

9 U.S.—*U.S. v. Wallace*, 448 F. Supp. 164 (E.D. Va. 1978).

10 Cal.—*People v. Reinard*, 220 Cal. App. 2d 720, 33 Cal. Rptr. 908 (2d Dist. 1963).

11 U.S.—*U.S. v. Wallace*, 448 F. Supp. 164 (E.D. Va. 1978).

12 Ill.—*People v. Estep*, 409 Ill. 125, 97 N.E.2d 823 (1951).

13 U.S.—*Marcello v. Ahrens*, 212 F.2d 830 (5th Cir. 1954), judgment aff'd, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).

14 U.S.—*Marcello v. Ahrens*, 212 F.2d 830 (5th Cir. 1954), judgment aff'd, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).

15 U.S.—*Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

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16C C.J.S. Constitutional Law § 1867

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1867. Essential requisites and sufficiency for due process determinations

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West's Key Number Digest

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Generally, applying the Due Process Clause is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedent and then by assessing the several interests that are at stake.

Generally, applying the Due Process Clause is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedent and then by assessing the several interests that are at stake.¹ In any event, the interpretation and application of the Due Process Clause are intensely practical matters,² and the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.³

The concept or test of due process is essentially one of fairness⁴ and reasonableness,⁵ and broadly stated, due process of law is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.⁶ Due process is not a mechanical instrument or yardstick,⁷ and is not a concept to be determined formalistically.⁸ Rather, the question of what amounts to due process in

any given case must be determined by the circumstances or nature of the particular case⁹ and, thus, what process is due in a given case depends upon its own particular facts.¹⁰ What constitutes due process in any given situation may also depend on the particular procedural provisions of applicable statutes.¹¹ Whether a statute or law secures due process depends on the subject on which it operates and the character of the rights affected thereby¹² and on the quality and nature of the activity with respect to the fair and orderly administration of the laws which it was the purpose of the Due Process Clause to insure.¹³

Because due process is not a fixed, rigid, or absolute,¹⁴ but rather a flexible,¹⁵ concept, it calls for such procedural protections as the particular situation demands,¹⁶ depending generally upon the importance or character or nature of the right or interest affected or involved,¹⁷ the nature or type of the matter or proceeding involved,¹⁸ and the possible burden on that proceeding.¹⁹

Once it is determined that due process applies, the question remains as to what process is due,²⁰ and generally, the determination of what process is due in a particular situation requires a balancing or weighing of the competing interests,²¹ that is, a balancing or weighing of the individual or private and governmental interests in each particular situation.²² Such balancing process requires the court to first identify and isolate the competing interests and then weigh their relative importance before reaching its constitutional assessment of the particular procedure required.²³

Identification of the specific dictates of due process generally requires consideration of the private interest that will be affected by the official action,²⁴ the risk of an erroneous deprivation of such interest through the procedures used,²⁵ and the probable value, if any, of additional or substitute procedural safeguards,²⁶ and finally, the government's interest, including the function involved²⁷ and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁸

Unlike the existence of the protectible interest,²⁹ the extent and nature of the procedures designed to protect against arbitrary and erroneous official action depend in large measure on the weight to be assigned the interest being infringed.³⁰ Thus, generally, the lesser the interest of which a person stands to be deprived, the fewer the procedural safeguards afforded to him or her by the Federal Constitution,³¹ and conversely, the more serious the deprivation, the more extensive the procedural safeguards which must precede its imposition.³²

Accordingly, the extent to which procedural due process must be afforded a person is influenced by the extent to which the person may be condemned to suffer a grievous loss.³³ While the right not to be deprived of a constitutionally protected interest extends to temporary deprivations as well as to those which are permanent,³⁴ the permanency of the loss of a protected interest is a factor militating in favor of greater due process protection³⁵ than that accorded a temporary deprivation.³⁶

Due process must generally be given before the deprivation of a right occurs, unless compelling public policy dictates otherwise.³⁷ While, generally, only the constitutional minimum of due process is guaranteed,³⁸ the requirement of due process is not satisfied by formal compliance,³⁹ merely procedural regularity,⁴⁰ or merely formal procedural correctness.⁴¹

Practice; usage.

A practice long in existence is not lightly set aside as in conflict with due process,⁴² and a procedure established by long usage is usually considered sufficient to fulfill the requirements of due process of law.⁴³ However, even long-standing practices are subject to constitutional scrutiny and must meet the advancing standards of due process.⁴⁴ Thus, the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but

it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.⁴⁵

State procedure affording due process.

While due process of law under the Federal Constitution is not measured entirely by an individual state's concept of due process, if the procedure prescribed by the State actually affords due process when the procedure is followed, there is no denial of federal due process.⁴⁶ Furthermore, where a state law grants more procedural rights than the Federal Constitution would otherwise require, the State's failure to abide by the state law is not a federal due process issue.⁴⁷

CUMULATIVE SUPPLEMENT

Cases:

The *Mathews* three-part inquiry to determine whether the procedures provided to protect a liberty or property interest are constitutionally sufficient requires courts to: (1) look at the nature of the interest that will be affected by the official action, and in particular, the degree of potential deprivation that may be created; (2) consider the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards; and (3) assess the public interest, which includes the administrative burden and other societal costs that would be associated with additional or substitute procedures. [U.S.C.A. Const.Amend. 14. Nozzi v. Housing Authority of City of Los Angeles, 806 F.3d 1178 \(9th Cir. 2015\).](#)

Analytical framework for determining whether fundamental fairness necessitates due process procedural protections requires the balancing of three factors: (1) the private interest at stake; (2) the government's interest in administrative efficiency; and (3) whether the additional procedures sought will increase the accuracy of fact-finding and reduce the risk of erroneous deprivation. [U.S. Const. Amend. 14. Cabinet for Health & Family Services v. K.S., 610 S.W.3d 205 \(Ky. 2020\).](#)

Due process test set forth in [Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18](#), recognizes that evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, so long as the person whose rights are affected is given opportunity to assert his claim prior to any administrative action. [U.S. Const. Amend. 14; N.J. Const. art. 1, par. 1. S.C. v. New Jersey Department of Children and Families, 242 N.J. 201, 231 A.3d 576 \(2020\).](#)

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Footnotes

- 1 U.S.—[Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 \(1981\).](#)
Idaho—[Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655 \(2014\).](#)
Ind.—[State v. Davis, 898 N.E.2d 281 \(Ind. 2008\).](#)
Neb.—[State v. Shambley, 281 Neb. 317, 795 N.W.2d 884, 78 A.L.R.6th 655 \(2011\).](#)
Ohio—[State v. Lynn, 129 Ohio St. 3d 146, 2011-Ohio-2722, 950 N.E.2d 931 \(2011\).](#)
No unchanging test
Fla.—[Hadley v. Department of Administration, 411 So. 2d 184 \(Fla. 1982\).](#)
- 2 U.S.—[Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 \(1975\).](#)
- 3 U.S.—[Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 \(1978\).](#)

Mont.—*State v. West*, 2008 MT 338, 346 Mont. 244, 194 P.3d 683 (2008).
 N.Y.—*De Prima v. Columbia-Greene Community College*, 89 Misc. 2d 620, 392 N.Y.S.2d 348 (Sup 1977).
 N.D.—*Isaacson v. Isaacson*, 2010 ND 18, 777 N.W.2d 886 (N.D. 2010).
 Tenn.—*Heyne v. Metropolitan Nashville Bd. of Public Educ.*, 380 S.W.3d 715, 286 Ed. Law Rep. 730 (Tenn. 2012).

Wash.—*In re Lain*, 179 Wash. 2d 1, 315 P.3d 455 (2013).

No application of formula

U.S.—*Groppi v. Leslie*, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).
 Conn.—*Hardy v. Superior Court, Judicial Dist. of Fairfield*, 305 Conn. 824, 48 A.3d 50 (2012).
 Utah—*McBride v. Utah State Bar*, 2010 UT 60, 242 P.3d 769 (Utah 2010).
 W. Va.—*Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).
 N.H.—*State v. Velez*, 150 N.H. 589, 842 A.2d 97 (2004).
 N.J.—*Mettinger v. Globe Slicing Mach. Co., Inc.*, 153 N.J. 371, 709 A.2d 779 (1998).

Core meaning

Ill.—*People v. Hall*, 198 Ill. 2d 173, 260 Ill. Dec. 198, 760 N.E.2d 971 (2001).

Fair play

Cal.—*Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1st Dist. 1970).
 Wis.—*State ex rel. Lyons v. De Valk*, 47 Wis. 2d 200, 177 N.W.2d 106 (1970).

Focus of inquiry

Once a fundamental interest is placed in jeopardy by state action, a court of review must focus its inquiry on the sufficiency of the procedures involved to insure fairness to a potentially aggrieved individual.

N.C.—*Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E.2d 765 (1981), decision modified on other grounds, 306 N.C. 333, 293 S.E.2d 95 (1982).

Shocking conscience or sense of justice

(1) The general test for identifying conduct that violates due process is to determine whether the particular action shocks the conscience.

U.S.—*Gedrich v. Fairfax County Dept. of Family Services*, 282 F. Supp. 2d 439 (E.D. Va. 2003).
 Fla.—*Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001).

(2) Due process forbids an action which is fundamentally unfair and shocking to a universal sense of justice.
 Alaska—*Church v. State, Dept. of Revenue*, 973 P.2d 1125 (Alaska 1999).

Ill.—*Ashcraft v. Board of Ed. of Danville Community Consol. School Dist. No. 118 of Vermilion County*, 83 Ill. App. 3d 938, 39 Ill. Dec. 392, 404 N.E.2d 983 (4th Dist. 1980).

Utah—*Mineer v. Board of Review of Indus. Commission*, 572 P.2d 1364 (Utah 1977).

Impossible not demanded; only the reasonable required

N.Y.—*Dobkin v. Chapman*, 25 A.D.2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966), order aff'd, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451 (1968).

Conn.—*Greater New Haven Property Owners Ass'n v. City of New Haven*, 288 Conn. 181, 951 A.2d 551 (2008).

Pa.—*Application of Christy*, 362 Pa. 347, 67 A.2d 85 (1949).

U.S.—*Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991); *In re Rijos*, 263 B.R. 382 (B.A.P. 1st Cir. 2001).

U.S.—*Evans v. Wilkerson*, 605 F.2d 369 (7th Cir. 1979).

U.S.—*Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982).

N.J.—*H.E.S. v. J.C.S.*, 175 N.J. 309, 815 A.2d 405 (2003).

S.C.—*South Carolina Dept. of Social Services v. Wilson*, 352 S.C. 445, 574 S.E.2d 730 (2002).

Tenn.—*Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002).

Question of judgment and degree

The determination of whether the demands of due process have been met in a particular case is always a question of judgment and degree to be answered in light of all the circumstances and with a view to fundamental fairness.

Cal.—*People v. Brown*, 26 Cal. App. 3d 825, 102 Cal. Rptr. 518 (2d Dist. 1972).

Iowa—*F.K. v. Iowa Dist. Court For Polk County*, 630 N.W.2d 801 (Iowa 2001), as amended on denial of reh'g, (July 27, 2001).

Md.—*Regan v. Board of Chiropractic Examiners*, 120 Md. App. 494, 707 A.2d 891 (1998), *aff'd*, 355 Md. 397, 735 A.2d 991 (1999).

Exigencies of each factual setting

Colo.—*People v. Lucero*, 196 Colo. 276, 584 P.2d 1208 (1978).

Accommodation to facts of each case

U.S.—*Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613 (E.D. Mo. 1972), judgment *aff'd*, 491 F.2d 490 (8th Cir. 1974).

Totality of facts

An asserted denial is to be tested by an appraisal of the totality of the facts in a given case; that which may, in one setting, constitute a denial of fundamental fairness, shocking to a universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial.

U.S.—*U. S. ex rel. Sheffield v. Waller*, 126 F. Supp. 537 (W.D. La. 1954).

11 U.S.—*U.S. v. Certain Parcels of Land in Prince George's County, Md.*, 40 F. Supp. 436 (D. Md. 1941).

12 Tex.—*Mumme v. Marrs*, 120 Tex. 383, 40 S.W.2d 31 (1931).

13 U.S.—*International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).

14 Idaho—*Swett v. St. Alphonsus Regional Medical Center*, 136 Idaho 74, 29 P.3d 385 (2001).

Not static

Md.—*Knapp v. Smethurst*, 139 Md. App. 676, 779 A.2d 970 (2001).

Tenn.—*City of White House v. Whitley*, 979 S.W.2d 262 (Tenn. 1998).

Not graven in stone

U.S.—*U.S. ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975).

Not wooden absolutes

U.S.—*U.S. v. Richardson Independent School Dist.*, 483 F. Supp. 80 (N.D. Tex. 1979), *aff'd*, 626 F.2d 171 (5th Cir. 1980).

Not technical conception

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.

U.S.—*Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).

Ariz.—*In re MH-2008-000867*, 225 Ariz. 178, 236 P.3d 405 (2010).

Idaho—*State v. Scraggins*, 153 Idaho 867, 292 P.3d 258 (2012).

Ind.—*State v. Davis*, 898 N.E.2d 281 (Ind. 2008).

Kan.—*In re Pierpoint*, 271 Kan. 620, 24 P.3d 128 (2001).

Ohio—*State v. Lynn*, 129 Ohio St. 3d 146, 2011-Ohio-2722, 950 N.E.2d 931 (2011).

Okla.—*Rogers v. Bailey*, 2011 OK 69, 261 P.3d 1150 (Okla. 2011).

15 U.S.—*Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).

Alaska—*Paula E. v. State, Department of Health & Social Services, Office of Children's Services*, 276 P.3d 422 (Alaska 2012).

Conn.—*Barros v. Barros*, 309 Conn. 499, 72 A.3d 367 (2013).

Del.—*Cohen v. State ex rel. Stewart*, 89 A.3d 65 (Del. 2014).

D.C.—*Wall v. Babers*, 82 A.3d 794 (D.C. 2014).

Fla.—*Abdool v. Bondi*, 141 So. 3d 529 (Fla. 2014).

Ga.—*Miller v. Deal*, 295 Ga. 504, 761 S.E.2d 274 (2014).

Haw.—*Minton v. Quintal*, 131 Haw. 167, 317 P.3d 1 (2013), as corrected, (Dec. 27, 2013).

Ill.—*Hayashi v. Illinois Dept. of Financial and Professional Regulation*, 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014).

Iowa—*Jones v. University of Iowa*, 836 N.W.2d 127, 297 Ed. Law Rep. 495 (Iowa 2013).

Ky.—*White v. Boards-Bey*, 426 S.W.3d 569 (Ky. 2014).

Md.—*State v. Cates*, 417 Md. 678, 12 A.3d 116 (2011).

Mass.—*Abbott A. v. Commonwealth*, 458 Mass. 24, 933 N.E.2d 936 (2010).

Me.—*Geary v. Department of Behavioral and Developmental Services*, 2003 ME 151, 838 A.2d 1162 (Me. 2003).

Mont.—*McDermott v. McDonald*, 2001 MT 89, 305 Mont. 166, 24 P.3d 200 (2001).

Neb.—*In re Brian B.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

Utah—*In re Discipline of Sonnenreich*, 2004 UT 3, 86 P.3d 712 (Utah 2004).

Change over time

(1) Due process undergoes evolutionary change to take into account the accepted current notions of fairness.

U.S.—*Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

(2) Not only does the concept of due process vary to meet the individual requirements of each situation, but it also changes over time to reflect changes in the society's valuation of various interests.

U.S.—*Betts v. Tom*, 431 F. Supp. 1369 (D. Haw. 1977).

U.S.—*Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).

Colo.—*A.M. v. A.C.*, 2013 CO 16, 296 P.3d 1026 (Colo. 2013), as modified on denial of reh'g, (Mar. 18, 2013).

Conn.—*Barros v. Barros*, 309 Conn. 499, 72 A.3d 367 (2013).

Del.—*Cohen v. State ex rel. Stewart*, 89 A.3d 65 (Del. 2014).

D.C.—*Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011).

Fla.—*School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009).

Haw.—*Ito v. Investors Equity Life Holding Co.*, 135 Haw. 49, 346 P.3d 118 (2015).

Mass.—*Com. v. Torres*, 441 Mass. 499, 806 N.E.2d 895 (2004).

Neb.—*In re Brian B.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

S.C.—*Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 656 S.E.2d 346 (2008).

Utah—*In re Discipline of Sonnenreich*, 2004 UT 3, 86 P.3d 712 (Utah 2004).

Context

A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case.

U.S.—*Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

Kind of procedure

(1) As long as meaningful relief through formal measures is available in a timely fashion after government action, relatively informal procedural protections are often sufficient for due process purposes prior to government action.

U.S.—*Layton v. Swapp*, 484 F. Supp. 958 (D. Utah 1979).

(2) Due process is a flexible standard that recognizes that not all situations calling for procedural safeguards call for the same kind of procedure.

Colo.—*People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Ark.—*State of Wash. v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999).

S.C.—*South Carolina Dept. of Social Services v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997).

Weight and practical requirements

When determining just what due process rights are appropriate in context, it is necessary to look both to the weight of the interest to be deprived and to the practical requirements of the situation.

U.S.—*Janusaitis v. Middlebury Volunteer Fire Dept.*, 464 F. Supp. 288 (D. Conn. 1979), judgment aff'd, 607 F.2d 17 (2d Cir. 1979).

What may be lost or taken

(1) The character of due process relief may depend on the importance of what the plaintiff stands to lose.

U.S.—*Peacock v. Board of Regents of Universities and State Colleges of Arizona*, 380 F. Supp. 1081 (D. Ariz. 1974), judgment aff'd, 510 F.2d 1324 (9th Cir. 1975).

(2) What is due process depends upon what the State or governmental body seeks to take from or deprive a person of receiving.

N.J.—*Gish v. Board of Ed. of Borough of Paramus, Bergen County*, 145 N.J. Super. 96, 366 A.2d 1337 (App. Div. 1976).

Fla.—*Hadley v. Department of Administration*, 411 So. 2d 184 (Fla. 1982).

Me.—*Hale v. Petit*, 438 A.2d 226 (Me. 1981).

N.Y.—*May v. Shaw*, 87 Misc. 2d 808, 386 N.Y.S.2d 625 (Sup 1976), judgment aff'd, 58 A.D.2d 807, 396 N.Y.S.2d 258 (2d Dep't 1977).

U.S.—*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

Md.—[Wagner v. Wagner](#), 109 Md. App. 1, 674 A.2d 1 (1996).

Essential inquiry

The essential inquiry in a case where a due process violation is alleged is to determine what manner of process is due the plaintiff and whether the procedure to which the plaintiff was subjected was fair under the circumstances.

R.I.—[Bionomic Church of Rhode Island v. Ruscetta](#), 424 A.2d 1063 (R.I. 1981).

Nature of decision

What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made.

U.S.—[Parham v. J. R.](#), 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

21 Conn.—[Thalheim v. Town of Greenwich](#), 256 Conn. 628, 775 A.2d 947 (2001).

Md.—[Wagner v. Wagner](#), 109 Md. App. 1, 674 A.2d 1 (1996).

N.Y.—[Garden Homes Woodlands Co. v. Town of Dover](#), 95 N.Y.2d 516, 720 N.Y.S.2d 79, 742 N.E.2d 593 (2000).

Termination of protected right

The processes required by the United States Constitution with respect to termination of a protected interest will vary depending on the importance attached to the interest and the particular circumstances under which the deprivation may occur.

U.S.—[Walters v. National Ass'n of Radiation Survivors](#), 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985).

22 Mass.—[Com. v. Brown](#), 426 Mass. 475, 688 N.E.2d 1356 (1998).

Okla.—[Barnes v. Barnes](#), 2005 OK 1, 107 P.3d 560 (Okla. 2005).

Pa.—[Khan v. State Bd. of Auctioneer Examiners](#), 577 Pa. 166, 842 A.2d 936 (2004).

Balancing of interests test

In determining whether state action violates due process principles, the court must choose between protecting the individual's guaranteed rights on one hand and the welfare of the general public on the other; this method of determining whether the State meets the requirements of due process is called the "balancing of interests" test.

Fla.—[Hadley v. Department of Administration](#), 411 So. 2d 184 (Fla. 1982).

Importance or severity of interests

(1) The extent of due process protections which should be afforded in a particular instance varies with the importance of the interest to be protected, as compared with the interest of the State in protecting the public welfare from an abuse of this interest.

S.C.—[South Carolina Dept. of Social Services v. Beeks](#), 325 S.C. 243, 481 S.E.2d 703 (1997).

(2) Due process requirements vary according to the severity of the private interest and government burden involved.

U.S.—[Jeter v. Kerr](#), 371 F. Supp. 338 (S.D. N.Y. 1974).

23 U.S.—[Davis v. U.S.](#), 415 F. Supp. 1086 (D. Kan. 1976).

Permission of exception

(1) The procedural protection should be given before the government takes an action which threatens to deprive a citizen of an interest, unless an important governmental interest, or preservation of interests of others, require otherwise.

Pa.—[Pennsylvania Coal Min. Ass'n v. Insurance Dept.](#), 471 Pa. 437, 370 A.2d 685 (1977).

(2) A state interest can be substantial enough to permit an exception to the general rules requiring due process.

Del.—[Broughton v. Warren](#), 281 A.2d 625 (Del. Ch. 1971).

24 U.S.—[Wilkinson v. Austin](#), 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); [City of Los Angeles v. David](#), 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

Iowa—[State v. Allen](#), 690 N.W.2d 684 (Iowa 2005).

Tenn.—[Keisling v. Keisling](#), 92 S.W.3d 374 (Tenn. 2002).

Showing of prejudice

(1) Proof of a denial of due process may require a showing of substantial prejudice.

U.S.—[Williams v. Taylor](#), 677 F.2d 510 (5th Cir. 1982).

(2) In order for a procedural defect to violate due process, the defect must be shown to be prejudicial.

Ga.—[Lentz v. State Personnel Bd.](#), 146 Ga. App. 366, 247 S.E.2d 145 (1978).

(3) Proof of prejudice is necessary if a denial of due process is to be made out.

Mo.—*In re Jones*, 431 S.W.2d 809 (Mo. 1966).

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U.S.—*Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); *City of Los Angeles v. David*, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

Iowa—*State v. Allen*, 690 N.W.2d 684 (Iowa 2005).

Tenn.—*Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002).

Generality of cases

Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not rare exceptions.

U.S.—*Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Error-free determinations

The Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.

U.S.—*Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).

Minimization of risk

The function of legal process is to minimize risk of erroneous decisions.

U.S.—*Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

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U.S.—*Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); *City of Los Angeles v. David*, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

Iowa—*State v. Allen*, 690 N.W.2d 684 (Iowa 2005).

Tenn.—*Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002).

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U.S.—*Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); *City of Los Angeles v. David*, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

Iowa—*State v. Allen*, 690 N.W.2d 684 (Iowa 2005).

Tenn.—*Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002).

Efficiency and economy

Although the governmental interest in efficiency and economy may be a relevant consideration in determining the contours of procedural protection, it is not controlling.

U.S.—*Justice v. Fabey*, 541 F. Supp. 1019, 34 Fed. R. Serv. 2d 1117, 34 U.C.C. Rep. Serv. 515 (E.D. Pa. 1982).

28

U.S.—*Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Ill.—*In re Andrea F.*, 208 Ill. 2d 148, 280 Ill. Dec. 531, 802 N.E.2d 782 (2003).

Nev.—*State, Dept. of Motor Vehicles and Public Safety v. Root*, 113 Nev. 942, 944 P.2d 784 (1997).

29

U.S.—*Helms v. Hewitt*, 655 F.2d 487 (3d Cir. 1981), judgment rev'd on other grounds, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

As to nature rather than weight of interest at stake as determinative of whether due process applies, see § 1867.

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U.S.—*Helms v. Hewitt*, 655 F.2d 487 (3d Cir. 1981), judgment rev'd on other grounds, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

Extent of loss or impairment

In addition to the nature of the private interest involved, the extent of loss or impairment of that interest is relevant to a due process inquiry.

N.J.—*Matter of Polk*, 90 N.J. 550, 449 A.2d 7 (1982).

31

U.S.—*Application of Eisenberg*, 654 F.2d 1107, 32 Fed. R. Serv. 2d 660, 60 A.L.R. Fed. 915 (5th Cir. 1981).

32

U.S.—*Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974).

Seriousness of harm

The exact nature of proceedings required by procedural due process depends on the seriousness of harm proven.

U.S.—*Johnson v. Brelje*, 482 F. Supp. 125 (N.D. Ill. 1979).

33

Kan.—*In Interest of Cooper*, 230 Kan. 57, 631 P.2d 632 (1981).

Neb.—*In Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

Reason for rule

A due process requirement that mandates minimum procedural safeguards when rights are so affected that an individual is likely to suffer a grievous loss is necessary in order to prevent arbitrary and capricious action by the State.

Ind.—[Dunn v. Jenkins](#), 268 Ind. 478, 377 N.E.2d 868 (1978).

U.S.—[Wells Fargo Armored Service Corp. v. Georgia Public Service Commission](#), 547 F.2d 938 (5th Cir. 1977).

N.J.—[Matter of Polk](#), 90 N.J. 550, 449 A.2d 7 (1982).

State-created benefits

If the deprivation of state-created benefits is merely temporary, and prompt and adequate procedures exist to correct errors in the eligibility determination, then the private interest is not as great, for due process purposes, as it is if the determination is final.

Or.—[Koskela v. Willamette Industries, Inc.](#), 331 Or. 362, 15 P.3d 548 (2000).

W. Va.—[Clarke v. West Virginia Bd. of Regents](#), 166 W. Va. 702, 279 S.E.2d 169 (1981).

Any reasonable procedure

A due process minimum is any reasonable procedure appropriate to the circumstances which fairly protects an individual from arbitrary action.

U.S.—[Burgess v. Miller](#), 492 F. Supp. 1284 (N.D. Fla. 1980).

U.S.—[Carter v. People of State of Illinois](#), 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).

Increase of protection

Due process does not require procedural safeguards as an end in themselves; there must be a demonstration that the safeguard in question will measurably increase the protection afforded the right at issue.

U.S.—[Cofone v. Manson](#), 409 F. Supp. 1033 (D. Conn. 1976).

Substance determinative

Due process is not interested in mere technical formalism, but substance determines whether due process has been afforded.

Cal.—[O'Reilly v. Board of Medical Examiners](#), 66 Cal. 2d 381, 58 Cal. Rptr. 7, 426 P.2d 167 (1967).

U.S.—[Carter v. People of State of Illinois](#), 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).

U.S.—[Foster v. People of State of Ill.](#), 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947).

U.S.—[First Nat. Ben. Soc. v. Garrison](#), 58 F. Supp. 972 (S.D. Cal. 1945), judgment aff'd, 155 F.2d 522 (C.C.A. 9th Cir. 1946).

Age of procedure; weight

The fact that a procedure is so old as to have become customary and well established in the community is of great weight in determining whether it conforms to due process.

U.S.—[Anderson Nat. Bank v. Lockett](#), 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944).

Strong case needed

If a thing has been practiced for a great many years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.

U.S.—[Jackman v. Rosenbaum Co.](#), 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107 (1922).

Cal.—[Taylor v. Madigan](#), 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1st Dist. 1975).

Cal.—[Gordon v. Justice Court](#), 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72, 71 A.L.R.3d 551 (1974).

U.S.—[Schall v. Martin](#), 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

U.S.—[Hebert v. Morley](#), 273 F. Supp. 800 (C.D. Cal. 1967).

U.S.—[Riccio v. County of Fairfax, Va.](#), 907 F.2d 1459 (4th Cir. 1990).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1868. Effect on due process guaranty on police power

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3902

The guaranty of due process does not prevent the exercise of police power provided such exercise is reasonable and not arbitrary, the law is for a public purpose, and the means selected have a real and substantial relation to the object sought to be attained.

The due process clauses and the police power have been said to operate independently, each within its own sphere.¹ The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law do not limit, and were not intended to limit, the subjects on which the police power of a state may lawfully be exerted.²

In broader terms, the rule has been stated that the due process clauses of the state and federal constitutions were not designed to interfere with, or destroy, the police power of the State;³ that they do not apply to the State acting under its police powers,⁴ or to laws enacted by a state legislature in the exercise of its police power⁵ or control the police power;⁶ that the Fourteenth Amendment does not impair the police power of a city or a municipality;⁷ that the guaranty of due process of law does not operate, or was not designed, as a limitation on, or interference with, the police power of the State to enact and enforce laws

and regulations to protect the public health and safety and promote the general welfare of the people;⁸ and that the prohibition of the Due Process Clause is subject to the police power of the State.⁹

However, it has also been stated that no exercise of the police power can disregard the constitutional guaranty with respect to due process¹⁰ and that the exercise of police power must comport with due process.¹¹ While an illegitimate exercise of police power is prohibited,¹² the due process guaranty does not interfere with, and is not violated by, the proper, valid, or reasonable exercise of the police power,¹³ as where such power is exercised on considerations of social policy,¹⁴ notwithstanding the effect of such exercise on private or personal rights,¹⁵ property or property rights,¹⁶ liberty,¹⁷ or contract rights,¹⁸ and although the regulations will result in a loss to individuals.¹⁹

The guaranty of due process does not prohibit, or prevent, governmental regulation for the public, or general, welfare,²⁰ morals,²¹ safety,²² or health,²³ it of necessity giving way to reasonable police regulations protecting life and property.²⁴

On the other hand, the Due Process Clause does limit or condition the exercise of the admitted power²⁵ by guarding against arbitrary action²⁶ and by securing that the end shall be accomplished by methods consistent with due process.²⁷ Substantive due process rights are balanced against the police power of a governing authority to protect the health, safety, morals, and general welfare of the people as governments have an inherent need to protect the safety and welfare of their citizens from the unrestrained liberty of some individuals.²⁸ This demands only that the law be for a public purpose or object,²⁹ which the government may legally accomplish,³⁰ or for a legitimate end,³¹ or that it have a reasonable relation to a proper legislative purpose.³² Also, due process requires that the law not be unreasonable, arbitrary, or capricious,³³ or oppressive;³⁴ or fundamentally unfair,³⁵ or a despotic spoliation of vested rights.³⁶ The means selected must have a real or substantial,³⁷ or an immediate or proximate and direct,³⁸ relation to, or a reasonable or rational connection with,³⁹ and must be appropriate to the achievement of,⁴⁰ the object sought to be obtained.

When the effect may be to invade rights guaranteed by the Fourteenth Amendment, the police power may be exerted only when the legislation bears a real and substantial⁴¹ or fair, just,⁴² and reasonable or rational⁴³ relation to, or promotes,⁴⁴ the public health, safety, morals, or some other phase of the general welfare.

The reasonableness of each regulation depends on the pertinent or relevant facts.⁴⁵ When the legislature attempts to exercise the police power of the State, all that is necessary to satisfy due process is that the interference be justified by established rules applicable to the case.⁴⁶ Its limits must be determined with appropriate regard to the particular subject of its exercise.⁴⁷ Moreover, when determining whether a statute is a valid exercise of police powers under due process principles, the court is concerned not with whether the legislature has chosen the best or most effective means of resolving the problems addressed by the statute, but only with whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety, and general welfare.⁴⁸

The due process guaranties have never been construed as being incompatible with the principle, equally vital because essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community⁴⁹ and hence subject to the fair exercise of the State's power to make regulations reasonably necessary for, or appropriate to, health, safety, and general welfare.⁵⁰ However, attempted regulations which extend beyond this legitimate scope of operation of the police power run afoul of the due process requirements of the state and federal constitutions.⁵¹

CUMULATIVE SUPPLEMENT

Cases:

Corporation Commission's permissive authority to regulate public service corporations (PSCs) is not exclusive; such authority does not, either expressly or impliedly, limit or divest the legislature of its police power to protect the health, safety, and welfare of the public. [Ariz. Const. art. 15, § 3](#). [Johnson Utilities, L.L.C. v. Arizona Corporation Commission](#), 468 P.3d 1176 (Ariz. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 N.J.—[Grosso v. Board of Adjustment of Millburn Tp. in Essex County](#), 137 N.J.L. 630, 61 A.2d 167 (N.J. Sup. Ct. 1948).
- 2 Iowa—[John R. Grubb, Inc. v. Iowa Housing Finance Authority](#), 255 N.W.2d 89 (Iowa 1977).
- 3 Minn.—[Abeln v. City of Shakopee](#), 224 Minn. 262, 28 N.W.2d 642 (1947).
- 4 Cal.—[Carpenter v. Pacific Mut. Life Ins. Co. of Cal.](#), 10 Cal. 2d 307, 74 P.2d 761 (1937), judgment aff'd, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182 (1938).
- 5 Wash.—[Cougar Business Owners Ass'n v. State](#), 97 Wash. 2d 466, 647 P.2d 481 (1982).
- 6 N.Y.—[People ex rel. Durham Realty Corporation v. La Fetra](#), 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152 (1921).
- 7 N.Y.—[Monarski v. Alexandrides](#), 80 Misc. 2d 260, 362 N.Y.S.2d 976 (Sup 1974).
- 8 U.S.—[Lacoste v. Department of Conservation of State of Louisiana](#), 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924).
- Iowa—[Green v. Shama](#), 217 N.W.2d 547 (Iowa 1974).
- Modification of guaranty**
The guaranty of due process is modified by a reasonable exercise of police power by the legislature to regulate or prohibit anything harmful to the welfare of the people.
Ill.—[Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.](#), 21 Ill. App. 3d 157, 313 N.E.2d 616 (5th Dist. 1974).
- Economic policy**
As far as the requirement of due process is concerned, and in the absence of another constitutional restriction, the State is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and to enforce that policy by legislation adapted to its purpose.
U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
- Welfare of many at expense of few**
Due process does not preclude the use of the inherent police power of the State to protect the health and welfare of many even at the expense of a few.
N.Y.—[Blair v. DuMond](#), 200 Misc. 1036, 108 N.Y.S.2d 738 (Sup 1951), judgment aff'd, 280 A.D. 1021, 117 N.Y.S.2d 23 (3d Dep't 1952), order resettled on other grounds, 281 A.D. 776, 117 N.Y.S.2d 918 (3d Dep't 1953).
- 9 Ill.—[Trust Co. of Chicago v. City of Chicago](#), 408 Ill. 91, 96 N.E.2d 499 (1951).
- 10 U.S.—[Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley](#), 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933).
- W. Va.—[Tweel v. West Virginia Racing Commission](#), 138 W. Va. 531, 76 S.E.2d 874 (1953).
- Review**
The legislative exercise of police power is subject to review upon a due process challenge.
Wash.—[Ford v. Bellingham-Whatcom County Dist. Bd. of Health](#), 16 Wash. App. 709, 558 P.2d 821 (Div. 1 1977).

- 11 N.J.—[Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.](#), 67 N.J. 151, 336 A.2d 713 (1975).
Municipality
Though broad, a municipality's police powers are limited by due process.
Colo.—[Town of Dillon v. Yacht Club Condominiums Home Owners Association](#), 2014 CO 37, 325 P.3d 1032 (Colo. 2014).
Balance between guaranty and power
The balance between due process and police power is more or less unstable as it must necessarily keep pace with economic and social orders, and as the exercise of police power increases to meet new conditions, the protection of the Due Process Clauses must necessarily recede to a corresponding degree.
Neb.—[Central Markets West, Inc. v. State](#), 186 Neb. 79, 180 N.W.2d 880 (1970), adhered to, 186 Neb. 276, 182 N.W.2d 898 (1971) and (overruled on other grounds by, [Louis Finocchiaro, Inc. v. Nebraska Liquor Control Com'n](#), 217 Neb. 487, 351 N.W.2d 701 (1984)).
- 12 Tex.—[Ex parte White](#), 82 Tex. Crim. 85, 198 S.W. 583 (1915).
- 13 U.S.—[Treigle v. Acme Homestead Ass'n](#), 297 U.S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A.L.R. 1284 (1936); [Terrace v. Thompson](#), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923).
Va.—[Alford v. City of Newport News](#), 220 Va. 584, 260 S.E.2d 241 (1979).
Encroachment on due process
Under certain circumstances and when validly exercised, the police power may encroach on due process guaranteed by the state and federal constitutions.
La.—[Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control](#), 216 La. 148, 43 So. 2d 248, 14 A.L.R.2d 680 (1949).
- 14 Va.—[Stickley v. Givens](#), 176 Va. 548, 11 S.E.2d 631 (1940).
- 15 Tex.—[Helton v. City of Burkburnett](#), 619 S.W.2d 23 (Tex. Civ. App. Fort Worth 1981), writ refused n.r.e., (Dec. 2, 1981).
Limitation of, or infringement on, rights
Okla.—[Oklahoma Natural Gas Co. v. Choctaw Gas Co.](#), 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).
- 16 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
Va.—[Alford v. City of Newport News](#), 220 Va. 584, 260 S.E.2d 241 (1979).
Impairment or destruction of property values
Idaho—[State v. Kellogg](#), 100 Idaho 483, 600 P.2d 787 (1979).
Taking or destruction of property or business
(1) Regulation under an authorized exercise of the police power complies with due process even though property or a business is taken or destroyed.
Pa.—[Appeals of Palumbo](#), 166 Pa. Super. 557, 72 A.2d 789 (1950).
(2) The fact that property may be destroyed as a result of the legitimate exercise of the police power of the State does not deprive the owner of it without due process of law within the meaning of the state and federal constitutions.
N.M.—[Alber v. Nolle](#), 98 N.M. 100, 1982-NMCA-085, 645 P.2d 456 (Ct. App. 1982).
- 17 La.—[Chapman v. City of Shreveport](#), 225 La. 859, 74 So. 2d 142 (1954).
- 18 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
Ky.—[Minor v. Stephens](#), 898 S.W.2d 71 (Ky. 1995).
- 19 Tex.—[Ex parte Clark](#), 139 Tex. Crim. 385, 140 S.W.2d 854 (1940).
Compensation not required
In like cases involving eminent domain, in the exercise of the police power, the due process requirements of the Fourteenth Amendment may be met without just compensation.
Mont.—[Yellowstone Valley Elec. Co-op., Inc. v. Ostermiller](#), 187 Mont. 8, 608 P.2d 491 (1980).
- 20 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
La.—[State v. Edwards](#), 787 So. 2d 981 (La. 2001).
Mass.—[Harlfinger v. Martin](#), 435 Mass. 38, 754 N.E.2d 63 (2001).
Extensive control of private interests
The Due Process Clause of the Fourteenth Amendment does not prevent extensive governmental control of private interests for the protection and welfare of the public at large.
U.S.—[Pyeatte v. Board of Regents of University of Okl.](#), 102 F. Supp. 407 (W.D. Okla. 1951), judgment aff'd, 342 U.S. 936, 72 S. Ct. 567, 96 L. Ed. 696 (1952).

- 21 La.—[State v. Edwards](#), 787 So. 2d 981 (La. 2001).
Mass.—[Harlfinger v. Martin](#), 435 Mass. 38, 754 N.E.2d 63 (2001).
- 22 La.—[State v. Edwards](#), 787 So. 2d 981 (La. 2001).
Mass.—[Harlfinger v. Martin](#), 435 Mass. 38, 754 N.E.2d 63 (2001).
Preference of those affected
Due process does not prevent a city from enforcing building, housing, or zoning codes even though persons who are themselves in danger may prefer to accept the hazards rather than undergo what they regard as worse consequences, at least when there is a danger to others and, under some circumstances, even when there is none.
U.S.—[English v. Town of Huntington](#), 448 F.2d 319 (2d Cir. 1971).
- 23 La.—[State v. Edwards](#), 787 So. 2d 981 (La. 2001).
Mass.—[Harlfinger v. Martin](#), 435 Mass. 38, 754 N.E.2d 63 (2001).
Remedy provided for taking of property
County officials did not violate the homeowners' due process rights when they ordered the subdivision property owners to evacuate their homes due to lethal gases seeping from the ground in order to protect the public health; the officials took the homeowners' property during an emergency for which the state law plainly provided an adequate postdeprivation remedy.
U.S.—[Miller v. Campbell County, Wyo.](#), 722 F. Supp. 687 (D. Wyo. 1989), order aff'd, 945 F.2d 348 (10th Cir. 1991).
- 24 La.—[Board of Barber Examiners of Louisiana v. Parker](#), 190 La. 214, 182 So. 485 (1938).
Reliance on former regulation immaterial
The exercise of public policy by a state cannot be resisted because of conduct or contracts done or made on faith of former exercises of public policy, on the ground that the later exercise thereof deprives persons of property or invalidates those contracts.
U.S.—[Thornton v. Duffy](#), 254 U.S. 361, 41 S. Ct. 137, 65 L. Ed. 304 (1920).
- 25 U.S.—[Lambert v. People of the State of California](#), 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957).
Ill.—[Scandoli v. City of Rockford](#), 86 Ill. App. 3d 999, 42 Ill. Dec. 58, 408 N.E.2d 436 (2d Dist. 1980).
Restraints by Fifth and Fourteenth Amendments
Restraints imposed on the national government, in the exercise of police power, by the Fifth Amendment are no greater than those imposed on the states by the Fourteenth Amendment.
U.S.—[Bowles v. Willingham](#), 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).
Standard of reasonableness
In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation on the exercise of police power.
N.C.—[Matter of Lassiter](#), 43 N.C. App. 525, 259 S.E.2d 336 (1979), judgment aff'd, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).
- 26 U.S.—[de Rodulfa v. U.S.](#), 461 F.2d 1240, 18 A.L.R. Fed. 890 (D.C. Cir. 1972).
- 27 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
N.Y.—[People v. Holbrook Transp. Corp.](#), 84 Misc. 2d 650, 378 N.Y.S.2d 939 (Dist. Ct. 1976).
Discrimination
Legislation, even though within the police power, may be violative of due process if it is discriminatory in that it deals with different classes of persons without the existence of some natural and substantial difference, germane to the subject and purposes of the legislation, between those within the class included and those whom it leaves untouched.
Conn.—[Schwartz v. Kelly](#), 140 Conn. 176, 99 A.2d 89 (1953).
- 28 La.—[State v. Golston](#), 67 So. 3d 452 (La. 2011).
- 29 U.S.—[Treigle v. Acme Homestead Ass'n](#), 297 U.S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A.L.R. 1284 (1936).
N.C.—[A-S-P Associates v. City of Raleigh](#), 298 N.C. 207, 258 S.E.2d 444 (1979).
Prevention of evil or preserving public welfare
(1) A public wrong to be corrected or the public welfare to be conserved must be the object of the exercise of police power.
Me.—[Gabriel v. Town of Old Orchard Beach](#), 390 A.2d 1065 (Me. 1978).

(2) A regulatory statute to be valid must have been enacted to prevent some manifest evil or to preserve the public health, morals, or welfare.

Ill.—*People v. Burton*, 100 Ill. App. 3d 1021, 56 Ill. Dec. 430, 427 N.E.2d 625 (4th Dist. 1981).

N.Y.—*Iannucci v. Melton*, 95 Misc. 2d 836, 408 N.Y.S.2d 662 (Sup 1978).

Scope of power

When considering a due process challenge to a governmental regulation on the ground that it is an invalid exercise of police power, whether the object of the legislation is within the scope of the police power must be borne in mind.

N.C.—*A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

Conn.—*State v. Chisholm*, 4 Conn. Cir. Ct. 565, 237 A.2d 101 (App. Div. 1967).

U.S.—*Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Fla.—*Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000).

U.S.—*Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A.L.R. 1284 (1936); *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Colo.—*Town of Dillon v. Yacht Club Condominiums Home Owners Association*, 2014 CO 37, 325 P.3d 1032 (Colo. 2014).

Fla.—*Haire v. Florida Dept. of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004).

Ill.—*People v. Wilson*, 214 Ill. 2d 394, 292 Ill. Dec. 887, 827 N.E.2d 416 (2005).

Kan.—*Lower v. Board of Directors of Haskell County Cemetery Dist.*, 274 Kan. 735, 56 P.3d 235 (2002).

Mont.—*Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283 (2009).

Arbitrary exercise of state police powers

Idaho—*Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008).

Arbitrary or unreasonable

N.J.—*Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, 199 N.J. 432, 972 A.2d 1141 (2009).

Unduly arbitrary or capricious

Me.—*State v. Haskell*, 2008 ME 82, 955 A.2d 737 (Me. 2008).

Balancing test

The demands of due process are proportional to the weight of the interest being protected in balancing that interest against countervailing interests of society, and if, after balancing these interests, the State's exercise of its police power is deemed to be reasonable, the legislation in question must be upheld.

Ill.—*Rawlings v. Illinois Dept. of Law Enforcement*, 73 Ill. App. 3d 267, 29 Ill. Dec. 333, 391 N.E.2d 758 (3d Dist. 1979).

Degree of reasonableness

Whether there is a violation of the law or a valid exercise of police power is a question of the degree of reasonableness in relation to the public goods.

N.C.—*North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

La.—*Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142 (1954).

Md.—*Tyler v. City of College Park*, 415 Md. 475, 3 A.3d 421 (2010).

Impairment of private rights

Private rights must not be unjustly or unreasonably impaired.

S.C.—*Ford v. Atlantic Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143 (1932), *aff'd*, 287 U.S. 502, 53 S. Ct. 249, 77 L. Ed. 457 (1933).

Cal.—*People v. Katrinak*, 136 Cal. App. 3d 145, 185 Cal. Rptr. 869 (2d Dist. 1982).

Mo.—*Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940).

U.S.—*Treigle Sash Factory v. Union Homestead Ass'n*, 297 U.S. 728, 56 S. Ct. 588, 80 L. Ed. 1010 (1936); *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Pa.—*Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982).

Contemporary conditions

The requirement that the means selected must have a real or substantial relation with the object sought to be obtained must be viewed in light of the contemporary conditions under which the legislature has seen fit to enact the statute in question.

N.C.—*State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

Test

The test to determine whether a state law passed under its police power violates the Fourteenth Amendment is whether there is no basis of fact on which to support the legislature's finding of public welfare or when the remedy prescribed has no possible connection with the evil to be cured.

U.S.—*American Coal Mining Co. v. Special Coal and Food Commission of Indiana*, 268 F. 563 (D. Ind. 1920).

Me.—*State v. National Advertising Co.*, 409 A.2d 1277 (Me. 1979).

R.I.—*Berger v. State Bd. of Hairdressing*, 118 R.I. 55, 371 A.2d 1053 (1977).

Social and economic legislation

To constitute a lawful exercise of the State's police power, for substantive due process purposes, social and economic legislation or regulations must seek to achieve a valid state objective by means that are rationally related to that objective.

Pa.—*Khan v. State Bd. of Auctioneer Examiners*, 577 Pa. 166, 842 A.2d 936 (2004).

Me.—*Seven Islands Land Co. v. Maine Land Use Regulation Com'n*, 450 A.2d 475 (Me. 1982).

U.S.—*Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928) (overruled on other grounds by, *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973)).

Cal.—*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676 (1979).

N.Y.—*Health Ins. Ass'n of America v. Harnett*, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280 (1978).

Fla.—*Haire v. Florida Dept. of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004).

Ill.—*Alarm Detection Systems, Inc. v. Village of Hinsdale*, 326 Ill. App. 3d 372, 260 Ill. Dec. 599, 761 N.E.2d 782 (2d Dist. 2001).

Any plausible or arguable reason

Under the rational basis test, a municipal ordinance is a valid exercise of the police power if it is substantially related to the public health, safety, or general welfare; in this regard, any plausible or arguable reason that supports an ordinance will satisfy substantive due process.

Ga.—*Old South Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869, 535 S.E.2d 751 (2000).

N.J.—*Chamber of Commerce of U. S. v. State*, 89 N.J. 131, 445 A.2d 353 (1982).

U.S.—*Idaho Maryland Mines Corp. v. U.S.*, 122 Ct. Cl. 670, 104 F. Supp. 576 (1952).

Scope of problem

The reasonableness of the duration of a moratorium imposed on a certain activity pursuant to the exercise of the police power must be measured, for due process purposes, by the scope of the problem which is being addressed.

U.S.—*Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369 (D. Md. 1975).

Tex.—*Stockwell v. State*, 203 S.W. 109 (Tex. Civ. App. Galveston 1918), writ granted, (Feb. 26, 1919) and *rev'd* on other grounds, 110 Tex. 550, 221 S.W. 932, 12 A.L.R. 1116 (1920).

U.S.—*Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

Nonpenal statute

Where a statute is nonpenal, the due process test is more easily met, especially when the statute involved is conducive of the public good or welfare.

Iowa—*State, ex rel. Iowa Dept. of Health v. Van Wyk*, 320 N.W.2d 599 (Iowa 1982).

Ill.—*People v. Wilson*, 214 Ill. 2d 394, 292 Ill. Dec. 887, 827 N.E.2d 416 (2005).

N.J.—*Ronade Associates v. Department of Conservation & Economic Development, Div. of Water Policy & Supply of State of N.J.*, 7 N.J. Super. 132, 72 A.2d 355 (App. Div. 1950).

Furtherance of public good

Property rights are not absolute and without limit, but are subject to regulation in direct furtherance of the public good.

N.Y.—*Ullmann Realty Co. v. Tamur*, 113 Misc. 538, 185 N.Y.S. 612 (Sup 1920).

N.Y.—*Application of Siebert*, 99 Misc. 2d 32, 415 N.Y.S.2d 589 (Sup 1979).

La.—*State v. Edwards*, 787 So. 2d 981 (La. 2001).

Tex.—[Falfurrias Creamery Co. v. City of Laredo](#), 276 S.W.2d 351 (Tex. Civ. App. San Antonio 1955), writ refused n.r.e., (May 18, 1955).

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16C C.J.S. Constitutional Law § 1869

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

1. In General

§ 1869. Equal protection distinguished from due process

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Equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law.

Generally, the concepts of equal protection and due process are not mutually exclusive.¹ The purpose of the guaranty of due process is to secure to all persons equal protection of the law,² due process of law being frequently spoken of as including equal protection of the laws, which is secured by laws operating on all alike.³ However, the concepts are not always interchangeable⁴ in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law.⁵ In any event, it is recognized that the Fifth Amendment's Due Process Clause encompasses equal protection principles⁶ and that, generally, the Due Process Clause of the Fifth Amendment imposes on the federal government the same or similar standard as is applied to states under the Equal Protection Clause.⁷

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Footnotes

- 1 U.S.—[Lee v. Habib](#), 424 F.2d 891 (D.C. Cir. 1970).
As to equal protection of the laws, generally, see §§ 1256 to 1609.
- 2 U.S.—[Greenberg v. Bolger](#), 497 F. Supp. 756 (E.D. N.Y. 1980).
Required minimum protection
The due process clause secures equality in providing a required minimum of protection for everyone's life, liberty and property.
Conn.—[State v. Townsend](#), 167 Conn. 539, 356 A.2d 125 (1975).
§ 1882.
- 3 U.S.—[Bolling v. Sharpe](#), 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), opinion supplemented on other grounds, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).
- 4 U.S.—[Bolling v. Sharpe](#), 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), opinion supplemented on other grounds, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).
- 5 U.S.—[Mathews v. De Castro](#), 429 U.S. 181, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976).
- 6 W. Va.—[Thorne v. Roush](#), 164 W. Va. 165, 261 S.E.2d 72 (1979).
Analysis of federal rules
The Due Process Clause of the Fifth Amendment authorizes analysis of federal rules under a traditional equal protection analysis.
U.S.—[Hampton v. Mow Sun Wong](#), 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).
- 7 U.S.—[Peick v. Pension Ben. Guar. Corp.](#), 539 F. Supp. 1025 (N.D. Ill. 1982), judgment aff'd, 724 F.2d 1247 (7th Cir. 1983).
Same safeguards or significance
(1) The Due Process Clause of the Fifth Amendment provides the same basic safeguards as the Equal Protection Clause.
U.S.—[U.S. v. Craven](#), 478 F.2d 1329 (6th Cir. 1973).
(2) The Due Process Clause of the Fifth Amendment provides essentially the same safeguard against invidious and unjustifiable discrimination in federal laws as the Equal Protection Clause of the Fourteenth Amendment does in the case of state laws.
U.S.—[U.S. v. Thoresen](#), 428 F.2d 654 (9th Cir. 1970).
(3) There may be an overriding national interest which would justify selective federal legislation which would be unacceptable for an individual state under the Fourteenth Amendment but, when a federal rule is applicable only to a limited territory and there is no special national interest involved, the Due Process Clause will be construed as having the same significance as the Equal Protection Clause.
U.S.—[Hampton v. Mow Sun Wong](#), 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

2. Persons Protected

§ 1870. Persons protected by due process guaranty, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3920 to 3926, 3932

The Due Process Clauses of the Federal Constitution protect all persons within the jurisdiction of the United States, and the provisions of the state constitutions protect proper persons within the respective states.

Generally, the constitutional right to be secure against deprivation of life, liberty, or property without due process of law as provided in the Federal Constitution is guaranteed not only to citizens but to any person within the United States.¹ Accordingly, aliens are entitled to constitutional protections when they have come within the territory of the United States and develop substantial connections with this country.² The right extends to all within the jurisdiction of the United States, wherever they may be domiciled,³ the provisions of the state constitutions protecting those within their terms domiciled in the respective states.⁴

While collective entities have no Fifth Amendment rights,⁵ and rights guaranteed by the Fourteenth Amendment are personal rights guaranteed to individuals and not to classes,⁶ every person, not otherwise excluded, is entitled to the protection without regard to his or her general merits as a citizen.⁷ Accordingly, a citizen of the United States is entitled to the protection of the

Fourteenth Amendment even though he or she has a bad criminal record.⁸ Even if a petitioner is guilty of the crime charged, he or she is nevertheless entitled to the protection of due process of law.⁹

Inhabitants of the territories of the United States are within the due process protection¹⁰ although other constitutional guaranties extend to unincorporated territories of the United States only as Congress, exercising its constitutional powers over such territories, makes them applicable.¹¹

The due process guaranty protects minors.¹² In fact, minors, as well as adults, possess a liberty interest under the United States Constitution entitling them to freedom from bodily restraint.¹³ However, the liberty interest of a minor is not coextensive with that of an adult¹⁴ but is qualitatively different and subject to reasonable regulation by the State to an extent not permissible with an adult.¹⁵ Unborn children, however, are not persons within the meaning of the Fourteenth Amendment.¹⁶

Judges.

Judges, like all other citizens, have protected due process interests.¹⁷

Persons convicted of crime.

Generally, a convicted person retains the freedom of speech and religion and may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law.¹⁸

Property owner.

A land-owning plaintiff entitled to substantive due process protection from government interference is limited to one who is the actual property owner.¹⁹

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Footnotes

- 1 U.S.—*Hayes v. Board of Regents of Kentucky State University*, 495 F.2d 1326 (6th Cir. 1974).
Kan.—*State v. Muriithi*, 273 Kan. 952, 46 P.3d 1145 (2002).
All persons within territorial jurisdiction
The Fourteenth and Fifth Amendments are not confined to the protection of citizens, but apply to all persons within the territorial jurisdiction, without regard to differences of race, creed, color, or nationality.
N.Y.—*Friedler v. University of New York*, 70 Misc. 2d 416, 333 N.Y.S.2d 928 (Sup 1972).
Pretrial detainee
A pretrial detainee's due process rights under the Fourteenth Amendment are protected to same extent as the rights guaranteed to a convicted person under the Eighth Amendment.
Mich.—*Jackson v. City of Detroit*, 449 Mich. 420, 537 N.W.2d 151 (1995).
Receiving governmental benefits
The liberties guaranteed by the Fifth Amendment cannot be limited by the fact that the individual involved receives governmental benefits.
N.J.—*State v. Thomas*, 111 N.J. Super. 42, 266 A.2d 614 (Law Div. 1970).
- 2 U.S.—*U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).
Kan.—*State v. Muriithi*, 273 Kan. 952, 46 P.3d 1145 (2002).
Nonresident aliens

Nonresident alien parents of a deceased airline employee lacked standing to challenge a workers' compensation provision restricting the death benefits paid to nonresident alien dependents of deceased workers as violative of the due process clauses of the state and federal constitutions; the parents could not invoke due process protections, which, due to their territorial nature, apply solely to citizens and resident aliens.

Ill.—*Jarabe v. Industrial Com'n*, 172 Ill. 2d 345, 216 Ill. Dec. 833, 666 N.E.2d 1 (1996).

Mass.—*Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England*, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

Citizens abroad

The Fifth Amendment applies to actions of our government as they affect American citizens abroad.

U.S.—*Williams v. Blount*, 314 F. Supp. 1356 (D. D.C. 1970).

Ill.—*Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

Provision limited

The section of a state constitution containing the guaranty of due process is narrower in scope than the Due Process Clause of the Fourteenth Amendment to the Federal Constitution and applies only in favor of those accused of a crime in a criminal proceeding.

R.I.—*Taglianetti v. New England Tel. & Tel. Co.*, 81 R.I. 351, 103 A.2d 67 (1954).

U.S.—*U.S. v. Greenleaf*, 546 F.2d 123 (5th Cir. 1977).

Cal.—*Department of General Services v. Superior Court*, 85 Cal. App. 3d 273, 147 Cal. Rptr. 422 (3d Dist. 1978).

Iowa—*State v. Cook*, 188 Iowa 655, 176 N.W. 674 (1920).

U.S.—*U.S. ex rel. Howard v. Ragen*, 59 F. Supp. 374 (N.D. Ill. 1945).

U.S.—*U.S. ex rel. O'Connell v. Ragen*, 212 F.2d 272 (7th Cir. 1954).

Crime of violence

The fact that the plaintiff has been found guilty of a crime of violence does not deprive him or her of the constitutional right to due process.

U.S.—*Hildebrandt v. Harris*, 130 F. Supp. 1 (S.D. N.Y. 1955).

U.S.—*Farrington v. Tokushige*, 273 U.S. 284, 47 S. Ct. 406, 71 L. Ed. 646 (1927).

As to application of Fifth Amendment to territories, generally, see § 1831.

U.S.—*Filipino Am. Veterans and Dependents Ass'n v. U. S.*, 391 F. Supp. 1314 (N.D. Cal. 1974).

U.S.—*Goldstein v. Spears*, 536 F. Supp. 606 (N.D. Ill. 1982).

N.Y.—*Matter of Guardianship and Custody of Jonathan E. G.*, 107 Misc. 2d 900, 436 N.Y.S.2d 546 (Fam. Ct. 1980).

Pa.—*In re F.C. III*, 607 Pa. 45, 2 A.3d 1201 (2010).

Divorce decree

Children have rights of which they may not be deprived by a divorce decree without due process of law.

N.Y.—*Earle v. Earle*, 205 Misc. 738, 130 N.Y.S.2d 238 (Dom. Rel. Ct. 1954).

Cal.—*In re Roger S.*, 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977).

Cal.—*In re Roger S.*, 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977).

U.S.—*Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977), decision aff'd, 626 F.2d 739 (9th Cir. 1980).

Cal.—*In re Roger S.*, 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977).

U.S.—*Green v. Stanton*, 451 F. Supp. 567 (N.D. Ind. 1978).

Mich.—*In re Chrzanowski*, 465 Mich. 468, 636 N.W.2d 758 (2001).

Md.—*Stouffer v. Reid*, 413 Md. 491, 993 A.2d 104 (2010).

Del.—*Dale v. Town of Elsmere*, 702 A.2d 1219 (Del. 1997).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

2. Persons Protected

§ 1871. Application of due process guaranty to corporations; state and political subdivisions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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The due process clauses protect corporations, at least insofar as their property rights are concerned, but the constitutional provisions establishing the rights of due process do not apply to municipal corporations or other political subdivisions of the state.

It has been stated generally that the protection of the Fifth Amendment may not be invoked by a corporation¹ and that corporation cannot bring a claim on its own behalf on the basis it was denied a liberty interest without due process of law.² However, it has also been held that corporations are "persons" entitled to the protection of the Due Process Clause of the Fourteenth Amendment.³

A distinction is made between due process as it affects "liberty" and as it affects property, and the "liberty" protected by the constitutional guaranties as to due process of law is that of natural, and not of artificial, persons.⁴ As far as their property rights are concerned, however, it is generally accepted that private corporations are "persons" within the scope of the guaranties, and in this respect, fall within constitutional protection,⁵ and this includes foreign corporations permitted to do business within a

state.⁶ Thus, while the liberty guaranteed by the Due Process Clause applies only to natural persons, a corporation's property rights are protected by the Due Process Clause.⁷

The Due Process Clause protects persons against the exercises of state power but does not protect the State from persons.⁸ Furthermore, a state's control over units of local government is without regard to due process guarantees.⁹ Thus, the constitutional provisions establishing the rights of due process do not apply to municipal corporations,¹⁰ counties,¹¹ or other political subdivisions of the State.¹²

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Footnotes

- 1 U.S.—*U.S. v. Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942).
Identical operation not required
 Natural persons and corporations are not similarly situated and due process does not require that law operate identically upon them.
 Ohio—*Union Sav. Ass'n v. Home Owners Aid, Inc.*, 23 Ohio St. 2d 60, 52 Ohio Op. 2d 329, 262 N.E.2d 558 (1970).
- 2 Wash.—*American Legion Post #149 v. Washington State Dept. of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008).
- 3 U.S.—*Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936).
 Pa.—*Com. ex rel. City of Allentown v. Howells*, 66 Pa. Commw. 647, 445 A.2d 875 (1982).
 Wash.—*American Legion Post #149 v. Washington State Dept. of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008).
- 4 U.S.—*Hague v. Committee for Indus. Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 27 S. Ct. 384, 51 L. Ed. 520 (1907); *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 27 S. Ct. 126, 51 L. Ed. 168 (1906).
 Ohio—*In re Emery*, 59 Ohio App. 2d 7, 13 Ohio Op. 3d 44, 391 N.E.2d 746, 9 A.L.R.4th 1214 (1st Dist. Hamilton County 1978).
- 5 U.S.—*Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980).
 Kan.—*State ex rel. Stephan v. Lane*, 228 Kan. 379, 614 P.2d 987 (1980).
Civil, religious, and educational corporations
 Although civil, religious, and educational corporations are not possessed of the rights of citizens under the Privileges and Immunities Clause of the Fourteenth Amendment, they cannot be deprived of their property without due process of law.
 U.S.—*Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928 (D. Or. 1924), *aff'd*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 (1925).
- 6 U.S.—*Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S. Ct. 436, 82 L. Ed. 673 (1938); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 43 S. Ct. 636, 67 L. Ed. 1112 (1923).
Subjection to unconstitutional state action
 A foreign corporation permitted to do business within the state may not be subjected to unconstitutional state action.
 U.S.—*Merced Dredging Co. v. Merced County*, 67 F. Supp. 598 (S.D. Cal. 1946).
- 7 Wash.—*American Legion Post #149 v. Washington State Dept. of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008).
- 8 Mass.—*Bain v. City of Springfield*, 424 Mass. 758, 678 N.E.2d 155 (1997).
- 9 Ill.—*East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel*, 178 Ill. 2d 399, 227 Ill. Dec. 568, 687 N.E.2d 1050, 123 Ed. Law Rep. 293 (1997).

- 10 La.—[Morial v. Smith & Wesson Corp.](#), 785 So. 2d 1 (La. 2001).
Tex.—[Proctor v. Andrews](#), 972 S.W.2d 729 (Tex. 1998).
- 11 Ga.—[Lumpkin County v. Georgia Insurers Insolvency Pool](#), 292 Ga. 76, 734 S.E.2d 880 (2012).
Neb.—[City of Lincoln v. Central Platte Natural Resources Dist.](#), 263 Neb. 141, 638 N.W.2d 839 (2002).
- 12 N.H.—[Appeal of New Hampshire Dept. of Employment Sec.](#), 140 N.H. 703, 672 A.2d 697 (1996).
Wash.—[Samuel's Furniture, Inc. v. State, Dept. of Ecology](#), 147 Wash. 2d 440, 54 P.3d 1194 (2002), amended on other grounds on denial of reconsideration, 63 P.3d 764 (Wash. 2003).
- City board of education**
Mo.—[Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.](#), 271 S.W.3d 1, 240 Ed. Law Rep. 441 (Mo. 2008).
- School district**
A school district, as a creature and political subdivision of the State, is neither a natural nor artificial "person" and, therefore, cannot invoke due process protection against the State.
Neb.—[Loup City Public Schools, School Dist. No. 1 of Sherman County v. Nebraska Dept. of Revenue](#), 252 Neb. 387, 562 N.W.2d 551, 118 Ed. Law Rep. 470 (1997).

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16C C.J.S. Constitutional Law § 1872

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

3. Procedural Aspects

§ 1872. Procedural aspects of due process, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879

Due process of law requires essential fairness and justice in judicial proceedings.

Due process of law requires essential fairness and justice in judicial proceedings,¹ and in determining whether such fairness and justice are present, the entire judicial process, including review on appeal, must be considered.² The integrity of the fact-finding process³ and the basic fairness of the decision⁴ are principal due process considerations.

In its procedural aspect, the constitutional guaranty of due process of law assures to every person the benefit of the general law⁵ and means that there can be no proceeding against life, liberty, or property without observance of those general rules established in our system of jurisprudence for the security of private rights.⁶ Furthermore, due process guarantees a course of legal procedure which has been established in our jurisprudence for the protection and enforcement of private rights.⁷ Due process of law includes steps essential under legal and equitable rules defining human rights and duties to deprive a person of life or liberty and covers means and methods prescribed or employable to accomplish the purposes of law.⁸

A procedural due process claim requires the plaintiff to show: (1) that he or she was deprived of a protected liberty or property interest, and (2) that he or she did not receive the process that was due to justify the deprivation of that interest.⁹ Whether procedural due process is provided by swift postdeprivation proceedings or whether it is required to be afforded prior to the deprivation depends upon the peculiar circumstances of the individual case.¹⁰ In cases where a state must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process is enough to satisfy the requirements of due process.¹¹

Even due process violations with de minimis damages are constitutionally cognizable claims; the right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions and because of the importance to organized society that procedural due process be observed.¹²

CUMULATIVE SUPPLEMENT

Cases:

Standard analysis under Due Process Clause proceeds in two steps: (1) court first asks whether there exists a liberty or property interest of which a person has been deprived, and (2) if so, it asks whether procedures followed by State were constitutionally sufficient. [U.S.C.A. Const.Amend. 14. Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 \(2011\).](#)

Statute allowing a workers' compensation claimant to dismiss an employer-initiated appeal of an Industrial Commission's determination only with the consent of the employer was rationally related to a legitimate state interest, and therefore, did not run afoul of the substantive due-process and due-course-of-law protections, despite fact that, pursuant to the statute, the claimant was the plaintiff in the common pleas court; statute was enacted to address situation in which a claimant in an employer-initiated workers' compensation appeal could unilaterally prolong the appeal process for the sole purpose of guaranteeing the continued receipt of benefits for at least an additional year, resulting in a needless extension of a process designed to run quickly, financial effects on the system as a whole, and a waste of judicial resources. [U.S. Const. Amend. 14; Ohio Const. art. 1, § 16; Ohio Rev. Code Ann. § 4123.512\(D\). Ferguson v. State, 151 Ohio St. 3d 265, 2017-Ohio-7844, 87 N.E.3d 1250 \(2017\).](#)

To show a violation of procedural due process, an individual must (1) identify a protected property right, (2) show that the state or a state actor has deprived the individual of that right; and (3) show that the deprivation was effected without due process. [U.S.C.A. Const.Amend. 14. Hallsmith v. City of Montpelier, 2015 VT 83, 125 A.3d 882 \(Vt. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[Babineaux v. Judiciary Commission, 341 So. 2d 396 \(La. 1976\).](#)
Minimum due process
The definition of minimum due process is sensitive to what proves necessary in practice to a fair procedure.
U.S.—[Rosati v. Haran, 459 F. Supp. 1148 \(E.D. N.Y. 1977\).](#)
Primary sense
The fairness of the procedure is due process in the primary sense.
U.S.—[Fitzgerald v. Hampton, 467 F.2d 755 \(D.C. Cir. 1972\).](#)
Common-law sense
A fair procedure in the common-law sense is not constitutional due process.
Or.—[Straube v. Emanuel Lutheran Charity Bd., 287 Or. 375, 600 P.2d 381 \(1979\).](#)

- 2 U.S.—*U. S. ex rel. Marelia v. Burke*, 101 F. Supp. 615 (E.D. Pa. 1951), judgment aff'd, 197 F.2d 856 (3d Cir. 1952).
- 3 Wash.—*Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (Div. 1 1982).
- Function of procedural protections**
- In the realm of fact-finding, the function of procedural protections is to minimize the risk of erroneous decisions.
- Vt.—*Relation v. Vermont Parole Bd.*, 163 Vt. 534, 660 A.2d 318 (1995).
- Hedge**
- The Due Process Clause provides minimum procedural safeguards as a hedge against the arbitrary determination of the factual predicate for imposition of the sanction.
- U.S.—*Adams v. Supreme Court of Pennsylvania*, 502 F. Supp. 1282 (M.D. Pa. 1980).
- 4 Wash.—*Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (Div. 1 1982).
- Unbiased and impartial decisionmaker**
- (1) The Due Process Clause requires an unbiased and impartial decisionmaker.
- Mich.—*Cain v. Michigan Dept. of Corrections*, 451 Mich. 470, 548 N.W.2d 210 (1996).
- N.C.—*In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).
- (2) An unbiased and impartial decisionmaker is one of the most, if not the most, fundamental of all the requirements of due process.
- Ala.—*Stallworth v. City of Evergreen*, 680 So. 2d 229 (Ala. 1996).
- Fair process of decision making**
- Despite the fact that the right to procedural due process may have an incidental effect on the substance of actions undertaken by the government, the guaranty of procedural due process merely imposes upon the State a duty to follow fair process of decision making.
- U.S.—*Owen v. Lash*, 682 F.2d 648 (7th Cir. 1982).
- 5 U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
- Ind.—*Gaddie v. Holloway*, 237 Ind. 382, 145 N.E.2d 426 (1957).
- 6 Ind.—*Gaddie v. Holloway*, 237 Ind. 382, 145 N.E.2d 426 (1957).
- Principal function**
- The principal function of the Due Process Clause is to ensure that state power is exercised only pursuant to procedures adequate to vindicate individual rights.
- U.S.—*In re Taylor*, 567 F.2d 1183 (2d Cir. 1977).
- Effect of determination**
- A determination that governmental action violated a citizen's right to procedural due process is merely a condemnation of procedures that attended the action and not an assessment of the constitutionality or propriety of the action itself.
- U.S.—*Owen v. Lash*, 682 F.2d 648 (7th Cir. 1982).
- Mistaken or unjustified deprivation**
- (1) Procedural due process rules are meant to protect persons not from the deprivation of life, liberty, or property, but from a mistaken or unjustified deprivation of such interests.
- U.S.—*Hester v. Rizzo*, 454 F. Supp. 537 (E.D. La. 1978).
- (2) The Due Process Clause serves to minimize a substantially unfair or mistaken deprivation of property.
- Wash.—*Buffelen Woodworking Co. v. Cook*, 28 Wash. App. 501, 625 P.2d 703 (Div. 2 1981).
- 7 Ind.—*Gaddie v. Holloway*, 237 Ind. 382, 145 N.E.2d 426 (1957).
- 8 Utah—*Christiansen v. Harris*, 109 Utah 1, 163 P.2d 314 (1945).
- Ends with proper procedures**
- The constitutional guaranty of procedural due process places restrictions on the manner in which the government may undertake actions that infringe upon the rights of the citizenry, but imposes no limitations on the ends that such governmental action, accompanied by proper procedures, may achieve.
- U.S.—*Owen v. Lash*, 682 F.2d 648 (7th Cir. 1982).
- Deprivation of protected interest**
- Only after finding the deprivation of a protected interest does the United States Supreme Court look to see if State's procedures comport with due process.
- U.S.—*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).

- 9 U.S.—*Armato v. Grounds*, 766 F.3d 713 (7th Cir. 2014).
- 10 U.S.—*Schrank v. Bliss*, 412 F. Supp. 28 (M.D. Fla. 1976).
- A.L.R. Library**
- Delay between seizure of personal property by Federal Government and institution of proceedings for forfeiture thereof as violative of Fifth Amendment due process requirements, 69 A.L.R. Fed. 373.
- 11 U.S.—*Patel v. Midland Memorial Hosp. and Medical Center*, 298 F.3d 333 (5th Cir. 2002).
- 12 U.S.—*Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215 (5th Cir. 2012).

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16C C.J.S. Constitutional Law § 1873

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

3. Procedural Aspects

§ 1873. Due process right to notice and hearing

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3953, 4027

Due process of law in its procedural aspect requires a notice and opportunity to be heard in an orderly proceeding adapted to the nature of the case, in accord with established rules, and the hearing must be fair, and before a competent and impartial tribunal having jurisdiction.

In its procedural aspect, the constitutional guaranty of due process of law assures to every person his or her day in court.¹ Thus, generally, due process of law, means and requires notice and the right or opportunity to be heard.² Its essential or indispensable elements,³ or its fundamental or basic,⁴ or minimal⁵ requirements are notice and opportunity to be heard or to defend. The legislature is without authority to dispense with these requirements of due process.⁶ The due process guaranty of a hearing means a right in persons, not a mere privilege to be extended to them by tribunals according to their ex parte judgment as to whether a hearing should be had.⁷ Notice must be reasonable⁸ and calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them opportunity to present their objections.⁹ The right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that matter is pending and can choose for himself or herself whether to appear or default, acquiesce, or contest.¹⁰ When notice is required as matter of due process, the means

employed to provide that notice must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.¹¹ However, parties who fail to take the steps necessary for receiving notice waive their due process protection and are not entitled to notice.¹² Furthermore, improvements in the reliability of new notice procedures adopted by the government do not necessarily demonstrate the infirmity, for purposes of the Due Process Clause, of those that were replaced.¹³

Due process requires some form or kind of hearing before an individual is deprived of a protected right, interest, or benefit¹⁴ except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.¹⁵ In any event, however, a full judicial or trial-type hearing is not required in every case,¹⁶ and the type of hearing to be given depends on the circumstances of each case,¹⁷ and the nature of the government function¹⁸ and the private or protected interest¹⁹ involved.

The opportunity to be heard is required to be adequate,²⁰ fair,²¹ full,²² or reasonable²³ and afforded at a meaningful time and in a meaningful manner.²⁴ However, an opportunity to be heard at a meaningful time does not mean only at such time as one party finds it to be convenient.²⁵ The hearing must be before a competent,²⁶ or a just, equitable and fair,²⁷ and impartial²⁸ court or tribunal having jurisdiction of the cause;²⁹ and before a trial,³⁰ and a judgment or decree.³¹ Such hearing is required to be fair,³² fair and impartial,³³ full and fair,³⁴ full and complete,³⁵ or on the merits.³⁶ An appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process.³⁷

There must be a hearing or orderly proceeding which is adapted, or appropriate, to the nature of the case,³⁸ adequate to safeguard the right for which the constitutional protection is invoked,³⁹ uniform and regular,⁴⁰ and in accordance with the law⁴¹ and with established rules which do not violate fundamental rights.⁴² Due process of law implies the right to contradict by proof every material fact which bears on the question of right involved.⁴³ There must be an adjudication of the same nature as is present in other cases.⁴⁴

The foregoing protective principles are not confined to strictly court proceedings but extend to every proceeding which may deprive a person of life, liberty, or property whether the process be judicial or administrative or executive in its nature.⁴⁵ Nevertheless, due process of law does not require a hearing in every conceivable case of government impairment of a private interest,⁴⁶ and the constitutional right to a hearing does not exist in all cases where the rights of individuals are affected or interfered with by an official action or procedure.⁴⁷ A plaintiff who asserts the right to a hearing under the Due Process Clause must show that the facts he or she seeks to establish in that hearing are relevant under the statutory scheme.⁴⁸

Legislative action.

Generally, legislative action is not burdened by the requirements of procedural due process principles,⁴⁹ and more particularly, except where the legislature has provided such right,⁵⁰ there is no constitutional due process requirement of notice and/or hearing applicable to legislative matters.⁵¹

CUMULATIVE SUPPLEMENT

Cases:

The procedural due process requirement is met when the defendant is provided with notice and an opportunity to be heard. U.S.C.A. Const.Amend. 14. *Neighbors for Preservation of Big and Little Creek Community v. Board of County Com'rs of Payette County*, 358 P.3d 67 (Idaho 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
Ga.—*Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).
W. Va.—*Freshwater v. Booth*, 160 W. Va. 156, 233 S.E.2d 312 (1977).
Due process satisfied
If a person has his or her day in court, he or she has not been deprived of due process.
Wash.—*State v. Malone*, 9 Wash. App. 122, 511 P.2d 67 (Div. 2 1973).
- 2 U.S.—*City of Los Angeles v. David*, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003); *Kendall v. Balcerzak*, 650 F.3d 515 (4th Cir. 2011).
Fla.—*Carmona v. Wal-Mart Stores, East, LP*, 81 So. 3d 461 (Fla. 2d DCA 2011).
Ga.—*CML-GA Smyrna, LLC v. Atlanta Real Estate Investments, LLC*, 294 Ga. 787, 756 S.E.2d 504 (2014).
La.—*Bays v. Bays*, 779 So. 2d 754 (La. 2001).
Neb.—*Potter v. Board of Regents of the University of Nebraska*, 287 Neb. 732, 844 N.W.2d 741, 303 Ed. Law Rep. 557 (2014).
Nev.—*J.D. Construction v. IBEX Int'l Group*, 240 P.3d 1033, 126 Nev. Adv. Op. No. 36 (Nev. 2010).
Pa.—*Com. v. Turner*, 622 Pa. 318, 80 A.3d 754 (2013), cert. denied, 134 S. Ct. 1771, 188 L. Ed. 2d 602 (2014).
Wash.—*In re A.W.*, 182 Wash. 2d 689, 344 P.3d 1186 (2015).
Purpose
(1) The purpose of the requirement of due process that an individual have the opportunity to be heard is not only to insure the abstract concept of fair play, but also to prevent the arbitrary deprivation of a liberty interest.
U.S.—*Adams v. Wainwright*, 512 F. Supp. 948 (N.D. Fla. 1981).
(2) One purpose of the procedural protection of property afforded by the constitutional right to a due process hearing is to provide the opportunity for a person to secure certain benefits and support claims of entitlement to protected rights, such as an interest in property which is being threatened by the State and its agencies.
Kan.—*Wertz v. Southern Cloud Unified School Dist. No. 334*, 218 Kan. 25, 542 P.2d 339 (1975).
Presentation of claim or case
The State may not finally destroy a property interest without first giving the putative owner the opportunity to present his or her claim of entitlement.
U.S.—*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).
Condemnation without hearing
(1) Due process forbids condemnation without a hearing.
La.—*Dupuy v. Tedora*, 204 La. 560, 15 So. 2d 886 (1943).
(2) An individual's procedural due process rights are violated when a deprivation of a right has occurred without an opportunity to be heard.
Fla.—*Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000).
(3) Due process of law requires that no one shall be condemned in person or property without the opportunity to be heard.
Ohio—*Hamilton v. Keiter*, 16 Ohio Misc. 260, 45 Ohio Op. 2d 285, 241 N.E.2d 296 (C.P. 1968).
A.L.R. Library
Tenants' rights, under Due Process Clause of Federal Constitution, to notice and hearing prior to imposition of higher rents or additional service charges for government-owned or government-subsidized housing, 28 A.L.R. Fed. 739.

- 3 U.S.—*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950);
Anderson Nat. Bank v. Lockett, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944).
 Vt.—*Rich v. Montpelier Supervisory Dist.*, 167 Vt. 415, 709 A.2d 501, 125 Ed. Law Rep. 736 (1998).
 Wis.—*Matter of Bilsie's Estate*, 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981).
- Notice and hearing in that order**
 N.C.—*Bowie v. Town of West Jefferson*, 231 N.C. 408, 57 S.E.2d 369 (1950).
- 4 U.S.—*Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (overruled on other grounds
 by, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)); *Mathews v. Eldridge*, 424
 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
 D.C.—*In re Asher*, 772 A.2d 1161 (D.C. 2001).
 Mass.—*Paquette v. Com.*, 440 Mass. 121, 795 N.E.2d 521 (2003).
 Utah—*Pangea Technologies, Inc. v. Internet Promotions, Inc.*, 2004 UT 40, 94 P.3d 257 (Utah 2004).
- Grievous loss**
 The right to be heard before being condemned to suffer a grievous loss of any kind, even though it may not
 involve the stigma and hardships of a criminal conviction, is a basic due process principle.
 D.C.—*In re Asher*, 772 A.2d 1161 (D.C. 2001).
- 5 U.S.—*Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
 Haw.—*State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004).
- 6 Ark.—*Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978).
- 7 U.S.—*WJR, The Goodwill Station v. F.C.C.*, 174 F.2d 226 (D.C. Cir. 1948), judgment rev'd on other grounds,
 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).
- Grace, favor, or discretion**
 Where the right of a hearing depends on grace, favor, or discretion of a person, board, or tribunal whose
 duty it is to decide the question at issue, the constitutional guaranty has been violated.
 Vt.—*In re Cornell*, 111 Vt. 525, 18 A.2d 304 (1941).
- 8 Ga.—*Ford v. Ford*, 270 Ga. 314, 509 S.E.2d 612 (1998).
 Wash.—*Duskin v. Carlson*, 136 Wash. 2d 550, 965 P.2d 611 (1998).
- Actual or constructive notice**
 Ill.—*Orton Crane & Shovel Co. v. Federal Reserve Bank of Chicago*, 409 Ill. 285, 99 N.E.2d 14 (1951).
- Requirement jurisdictional**
 The failure to give proper notice constitutes a jurisdictional defect and results in a lack of due process of law.
 Conn.—*Hartford Elec. Light Co. v. Water Resources Commission*, 162 Conn. 89, 291 A.2d 721 (1971).
- 9 U.S.—*Morrison v. Warren*, 375 F.3d 468, 2004 FED App. 0223P (6th Cir. 2004).
 Kan.—*Board of County Comr's of Reno County v. Akins*, 271 Kan. 192, 21 P.3d 535 (2001).
 N.H.—*Brewster v. Town of Amherst*, 144 N.H. 364, 742 A.2d 121 (1999).
- Similar statements**
 (1) Notice must be reasonably calculated to convey necessary information and to afford interested parties
 reasonable time for a hearing.
 Ill.—*Valdez v. City of Ottawa*, 105 Ill. App. 3d 972, 61 Ill. Dec. 595, 434 N.E.2d 1192, 32 A.L.R.4th 718
 (3d Dist. 1982).
 (2) Notice is sufficient, for due process purposes, if it informs the party of the nature of the proceedings so
 there is no unfair surprise.
 N.D.—*Morrell v. North Dakota Dept. of Transp.*, 1999 ND 140, 598 N.W.2d 111 (N.D. 1999).
 (3) Due process inexorably commands notice which reasonably informs a person that his or her legally
 protected interest may be adversely affected.
 Okla.—*Matter of C. G.*, 1981 OK 131, 637 P.2d 66 (Okla. 1981).
- Purpose**
 The primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for
 a hearing is meaningful.
 U.S.—*City of West Covina v. Perkins*, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).
- 10 U.S.—*Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
- 11 **Assessing adequacy of particular form of notice**

Assessing the adequacy, under the Due Process Clause of the Fourteenth Amendment, of a particular form of notice requires the court to balance the interest of state against the individual interest sought to be protected by the Fourteenth Amendment.

U.S.—*Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

12 Utah—*Hall v. NACM Intermountain, Inc.*, 1999 UT 97, 988 P.2d 942 (Utah 1999).

13 U.S.—*Dusenbery v. U.S.*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

14 U.S.—*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982); *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (overruled on other grounds by, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

Iowa—*Owens v. Brownlie*, 610 N.W.2d 860 (Iowa 2000).

Miss.—*Harris v. Mississippi Valley State University*, 873 So. 2d 970, 188 Ed. Law Rep. 562 (Miss. 2004).

As to due process requirement applicable to hearing in civil remedies and proceedings, generally, see §§ 1964, 1969.

As to rights, interests, or benefits protected, generally, see § 1865.

15 U.S.—*Knisley v. Monroe*, 539 F. Supp. 849 (W.D. Mich. 1982).

Interest and assurance

Important governmental interest, accompanied by substantial assurance that deprivation is not baseless or unwarranted, may in limited cases demand prompt action justifying postponing opportunity to be heard until after initial deprivation.

U.S.—*Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988).

Promptness

In cases where a hearing may occur subsequent to the infringement of a protected interest, a hearing must be held promptly and before an extended deprivation.

U.S.—*Johnson v. San Jacinto Jr. College*, 498 F. Supp. 555 (S.D. Tex. 1980).

16 U.S.—*Lawrence v. Petit*, 492 F. Supp. 1203 (D.R.I. 1980).

17 Idaho—*Swett v. St. Alphonsus Regional Medical Center*, 136 Idaho 74, 29 P.3d 385 (2001).

Iowa—*Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139 (Iowa 1978).

Capacities and circumstances

The due process requirement of an opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.

U.S.—*Adams v. Wainwright*, 512 F. Supp. 948 (N.D. Fla. 1981).

Less complex issues

As issues to be determined grow less complex, so does the hearing required to satisfy due process.

Del.—*State v. Kamalski*, 429 A.2d 1315 (Del. Super. Ct. 1981).

18 U.S.—*Gerritson v. Vance*, 488 F. Supp. 267 (D. Mass. 1980).

N.J.—*In re Allegations of Physical Abuse at Blackacre Academy on 2/10/93*, 304 N.J. Super. 168, 698 A.2d 1275, 120 Ed. Law Rep. 1067 (App. Div. 1997).

19 Ill.—*Wendl v. Moline Police Pension Bd.*, 96 Ill. App. 3d 482, 51 Ill. Dec. 949, 421 N.E.2d 584 (3d Dist. 1981).

Balancing test

The test for the type of hearing required by due process once it has been established that there has been or will be a deprivation of a protected interest appears to be a balancing test.

La.—*Haughton Elevator Division v. State, Through Division of Administration*, 367 So. 2d 1161 (La. 1979).

20 N.J.—*State v. Standard Oil Co.*, 2 N.J. Super. 442, 64 A.2d 386 (Ch. Div. 1949), supplemented on other grounds, 5 N.J. Super. 460, 68 A.2d 499 (Ch. Div. 1949), judgment modified on other grounds, 5 N.J. 281, 74 A.2d 565 (1950), judgment aff'd, 341 U.S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1951).

Number of trials

Due process requires that a fair trial be had but not two or three fair trials.

Cal.—*Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 P.2d 323 (1st Dist. 1947).

21 Fla.—*Peoples Bank of Indian River County v. State, Dept. of Banking and Finance*, 395 So. 2d 521 (Fla. 1981).

Utah—*State in Interest of L. G. W.*, 638 P.2d 527 (Utah 1981).

- 22 Ohio—Gallagher v. Harrison, 86 Ohio App. 73, 40 Ohio Op. 494, 55 Ohio L. Abs. 97, 88 N.E.2d 589 (1st Dist. Hamilton County 1949).
- 23 U.S.—Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).
Iowa—In re Lemke's Estate, 216 N.W.2d 186 (Iowa 1974).
- 24 U.S.—City of Los Angeles v. David, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
Ark.—Watkins v. State, 2010 Ark. 156, 362 S.W.3d 910 (2010).
D.C.—Price v. Independence Federal Savings Bank, 110 A.3d 567 (D.C. 2015).
Iowa—Jones v. University of Iowa, 836 N.W.2d 127, 297 Ed. Law Rep. 495 (Iowa 2013).
S.D.—Gul v. Center for Family Medicine, 2009 SD 12, 762 N.W.2d 629, 242 Ed. Law Rep. 374 (S.D. 2009).
Wash.—In re Detention of Morgan, 180 Wash. 2d 312, 330 P.3d 774 (2014).
W. Va.—In re J.S., 233 W. Va. 394, 758 S.E.2d 747 (2014).
Wyo.—Kelly v. Kilts, 2010 WY 151, 243 P.3d 947 (Wyo. 2010).
- In administrative context**
N.M.—TW Telecom of New Mexico, L.L.C. v. New Mexico Public Regulation Com'n, 2011-NMSC-029, 150 N.M. 12, 256 P.3d 24 (2011).
D.C.—In re Asher, 772 A.2d 1161 (D.C. 2001).
- 25 Ohio—Rumora v. Board of Ed. of Ashtabula Area City School Dist., 32 Ohio Misc. 165, 61 Ohio Op. 2d 289, 290 N.E.2d 195 (C.P. 1972).
- 26 Wash.—Watson v. Washington Preferred Life Ins. Co., 81 Wash. 2d 403, 502 P.2d 1016 (1972).
- Nature of tribunal**
The requirement that the hearing must be before a competent tribunal applies whether the tribunal exercising jurisdiction over rights or privileges protected by the Due Process Clause is a judicial, legislative, executive, or administrative one.
Tex.—Francisco v. Board of Dental Examiners, 149 S.W.2d 619 (Tex. Civ. App. Austin 1941), writ refused.
- 27 Ill.—Arvia v. Madigan, 209 Ill. 2d 520, 283 Ill. Dec. 895, 809 N.E.2d 88, 34 A.L.R.6th 803 (2004).
N.M.—Reid v. New Mexico Bd. of Examiners of Optometry, 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198 (1979).
- 28 U.S.—Schweiker v. McClure, 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982).
Cal.—Haas v. County of San Bernardino, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (2002).
Idaho—State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003).
Utah—Dairy Product Services, Inc. v. City of Wellsville, 2000 UT 81, 13 P.3d 581 (Utah 2000).
- Appearance of justice**
Due process requires that the appearance of justice be satisfied.
W. Va.—Louk v. Haynes, 159 W. Va. 482, 223 S.E.2d 780 (1976).
- Neutral and detached**
Due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party.
U.S.—Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).
- 29 Pa.—Parker v. Children's Hospital of Philadelphia, 483 Pa. 106, 394 A.2d 932 (1978).
- Power to hear and determine case**
Ill.—Baumgardner v. Boyer, 384 Ill. 584, 52 N.E.2d 247 (1943).
- 30 N.C.—Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951).
- 31 N.C.—Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951).
- 32 Cal.—In re Watson, 91 Cal. App. 3d 455, 154 Cal. Rptr. 151 (4th Dist. 1979).
Iowa—Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981).
- Fair trial of issues involved**
Mich.—Dation v. Ford Motor Co., 314 Mich. 152, 22 N.W.2d 252 (1946).
- Access to information**
A fair hearing, for purposes of the state constitution's due process guarantee, entails adequate access to information requested in discovery.
Alaska—Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Bd., 991 P.2d 202 (Alaska 1999).
- 33 U.S.—Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

Ill.—*Florsheim Shoe Co. v. Illinois Fair Employment Practices Commission*, 99 Ill. App. 3d 868, 55 Ill. Dec. 46, 425 N.E.2d 1219 (1st Dist. 1981).

U.S.—*West Penn Power Co. v. Train*, 522 F.2d 302 (3d Cir. 1975).

Kan.—*Carrigg v. Anderson*, 167 Kan. 238, 205 P.2d 1004, 9 A.L.R.2d 545 (1949).

N.Y.—*Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).

U.S.—*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

U.S.—*U. S. v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

Del.—*Vincent v. Eastern Shore Markets*, 970 A.2d 160 (Del. 2009).

Ill.—*Wisam I, Inc. v. Illinois Liquor Control Com'n*, 2014 IL 116173, 385 Ill. Dec. 1, 18 N.E.3d 1 (Ill. 2014), cert. denied, 135 S. Ct. 1494 (2015).

Okla.—*Edwards v. City of Sallisaw*, 2014 OK 86, 339 P.3d 870 (Okla. 2014).

Wis.—*Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (2001).

Procedure affecting property interests

What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect on the rights asserted, and all other circumstances which may render a proceeding appropriate to the nature of the case.

U.S.—*Anderson Nat. Bank v. Lockett*, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944).

Presentation of issues

Due process includes the right to present legal and factual issues in a deliberate and orderly manner.

Cal.—*White v. Board of Medical Quality Assurance*, 128 Cal. App. 3d 699, 180 Cal. Rptr. 516 (4th Dist. 1982).

U.S.—*Anderson Nat. Bank v. Lockett*, 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944).

Iowa—*State v. Willard*, 756 N.W.2d 207 (Iowa 2008).

Me.—*In re M.B.*, 2013 ME 46, 65 A.3d 1260 (Me. 2013).

N.C.—*State v. Shelton*, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

W. Va.—*In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008).

N.C.—*Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Mont.—*Sorensen v. Jacobson*, 125 Mont. 148, 232 P.2d 332, 26 A.L.R.2d 1186 (1951).

La.—*Vaughan v. Housing Authority of New Orleans*, 80 So. 2d 561 (La. Ct. App., Orleans 1955).

Arbitrary, oppressive, or unjust proceeding

(1) Due process of law is denied only where the proceeding is arbitrary, oppressive, or unjust.

N.J.—*Horsman Dolls v. Unemployment Compensation Commission*, 7 N.J. 541, 82 A.2d 177 (1951).

(2) Due process of law excludes all arbitrary dealings with persons or property.

Cal.—*In re Buchman's Estate*, 123 Cal. App. 2d 546, 267 P.2d 73, 47 A.L.R.2d 291 (2d Dist. 1954).

Whim or caprice; personal judgment

(1) Dependence of personal liberty on the whim, sufferance, or caprice of any other person or bodies of persons cannot be condoned or justified as being in conformity with due process of law.

Ohio—*Hamilton v. Keiter*, 16 Ohio Misc. 260, 45 Ohio Op. 2d 285, 241 N.E.2d 296 (C.P. 1968).

(2) A judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice, and is not to be based upon the idiosyncrasies of merely a personal judgment.

U.S.—*Leland v. State of Or.*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952).

Ala.—*Broadway v. Alabama Dry Dock & Shipbuilding Co.*, 246 Ala. 201, 20 So. 2d 41 (1944).

Pa.—*Petition of Kariher*, 284 Pa. 455, 131 A. 265 (1925).

Substantive assertions

The court need not consider the merits of the plaintiff's substantive assertions in ruling on a procedural due process claim.

U.S.—*Harper v. Blumenthal*, 478 F. Supp. 176 (D.D.C. 1979).

Determination of evidentiary questions

(1) Due process of law imports a determination of disputed questions of fact on the basis of the evidence.

Mich.—*Dation v. Ford Motor Co.*, 314 Mich. 152, 22 N.W.2d 252 (1946).

(2) A determination of sufficiency of the evidence to support the finding of the trial court must be made.

Ind.—*McKee v. Hasler*, 229 Ind. 437, 98 N.E.2d 657 (1951).

45 Ill.—*Arvia v. Madigan*, 209 Ill. 2d 520, 283 Ill. Dec. 895, 809 N.E.2d 88, 34 A.L.R.6th 803 (2004).

46 U.S.—*Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

D.C.—*In re Sibley*, 990 A.2d 483 (D.C. 2010).

Mo.—*Lewandowski v. Danforth*, 547 S.W.2d 470 (Mo. 1977).

S.C.—*Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 656 S.E.2d 346 (2008).

Encompassed interest

The right to a hearing attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment.

R.I.—*Paiva v. Providence Redevelopment Agency*, 116 R.I. 315, 356 A.2d 203 (1976).

47 Okla.—*Pryor v. Western Paving Co.*, 1919 OK 222, 74 Okla. 308, 184 P. 88 (1919).

48 U.S.—*Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

Adjudicative decisions

(1) Only those governmental decisions which are adjudicative in nature are subject to procedural due process principles.

Cal.—*Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979).

(2) Procedural due process is required in the fixing of boundaries of political subdivision of the state into counties or districts for public purposes only when an officer to whom such power has been delegated is required to decide adjudicative facts.

Neb.—*Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977).

50 Ariz.—*Gillard v. Estrella Dells I Imp. Dist.*, 25 Ariz. App. 141, 541 P.2d 932 (Div. 1 1975).

51 U.S.—*E & E Hauling, Inc. v. Forest Preserve Dist. of Du Page County, Ill.*, 613 F.2d 675 (7th Cir. 1980).

Cal.—*Morro Hills Community Services Dist. v. Board of Supervisors*, 78 Cal. App. 3d 765, 144 Cal. Rptr. 778 (4th Dist. 1978).

Lapse of property interest

Where the State enacted a rule of law uniformly affecting all citizens that established circumstances in which a property interest would lapse through the inaction of its owner, it was not necessary that an individual be given advance notice before such rule of law could operate.

U.S.—*Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

3. Procedural Aspects

§ 1874. Particular process or proceeding

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West's Key Number Digest, [Constitutional Law](#)  3865, 3879

While due process of law does not guarantee any particular form or mode of procedure, ordinarily, but not invariably, the requirement implies a judicial proceeding.

While constitutional provisions may contain no description of those processes which they were intended to allow or forbid, clearly it was not left to the legislative power to enact any process which might be devised.¹ Hence, while due process of law does not guarantee any particular form, mode, or method of procedure,² the fundamental principles inherent therein must be observed.³ However, the Due Process Clause does not impose the duty to establish ideal systems for the administration of justice with every modern improvement and with provision against every possible hardship that may befall⁴ or which are impervious to malfunctions.⁵

Under ordinary circumstances, the requirement of due process implies a judicial proceeding, action, or process,⁶ but such a proceeding, action, or process is not invariably required or essential⁷ or necessarily meant.⁸ In a proper case, the purposes

of the law, especially as to property, may be effected by executive or administrative action and still be valid if it meets the requirements of due process.⁹

The proceedings provided need not be according to the course of the common law.¹⁰ Due process is not limited to the process of settled usage of the past but may include new methods of procedure unknown to the common law provided they are in harmony with the underlying principles of such procedure according to the traditions of the common law.¹¹ Generally, when the sovereign has established rules to govern its own conduct, it will be held to such self-imposed limitation on its own authority, departure from which denies due process of law.¹² A state does not violate the Due Process Clause by providing alternative or additional procedures beyond what the Federal Constitution requires.¹³

Under the due process guaranty, one may claim neither a right to trial by jury¹⁴ nor a right to appeal.¹⁵

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Footnotes

- 1 Colo.—*People ex rel. Juhan v. District Court for Jefferson County*, 165 Colo. 253, 439 P.2d 741 (1968).
- 2 U.S.—*Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949); *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).
Ga.—*CML-GA Smyrna, LLC v. Atlanta Real Estate Investments, LLC*, 294 Ga. 787, 756 S.E.2d 504 (2014).
Neb.—*In re S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012), cert. denied, 133 S. Ct. 837, 184 L. Ed. 2d 663 (2013).
Okla.—*State ex rel. Bd. of Regents of University of Oklahoma v. Lucas*, 2013 OK 14, 297 P.3d 378, 290 Ed. Law Rep. 1069 (Okla. 2013).
Wash.—*Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (Div. 1 1982).
Single model
No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.
U.S.—*Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).
- 3 Ala.—*Opinion of the Justices*, 252 Ala. 351, 40 So. 2d 849 (1949).
Practice in many states
The fact that a practice is followed by a large number of states is not conclusive in the decision as to whether that practice accords with due process but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.
U.S.—*McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).
- 4 U.S.—*Ownbey v. Morgan*, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921).
- 5 Ind.—*Osborn v. Review Bd. of Indiana Employment Sec. Division*, 178 Ind. App. 22, 381 N.E.2d 495 (1978).
- 6 N.J.—*Hyman v. Muller*, 1 N.J. 124, 62 A.2d 221 (1948).
- 7 Utah—*Lindon City v. Engineers Const. Co.*, 636 P.2d 1070 (Utah 1981).
- 8 Cal.—*Westinghouse Elec. Corp. v. County of Los Angeles*, 42 Cal. App. 3d 32, 116 Cal. Rptr. 742 (2d Dist. 1974).
Sufficient factors
Due process does not necessarily mean a judicial process; it is sufficient if there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review at least to ascertain whether the fundamental elements of due process have been met.
Md.—*Burke v. Fidelity Trust Co.*, 202 Md. 178, 96 A.2d 254 (1953).
- 9 Utah—*Christiansen v. Harris*, 109 Utah 1, 163 P.2d 314 (1945).
As to administrative proceedings, see §§ 2010 to 2025.

- 10 U.S.—*Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
- 11 Cal.—*People v. Troche*, 206 Cal. 35, 273 P. 767 (1928) (overruled in part on other grounds by, *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949)).
- Incorporation and fossilization**
The Fifth and Fourteenth Amendment Due Process Clauses were not intended to incorporate and fossilize the common law as it existed at the time of their adoption.
Ind.—*Shepherd v. State*, 254 Ind. 404, 260 N.E.2d 563 (1970).
- Change in rules; absence of rule**
(1) No change in the rules of procedure can be made which disregards fundamental principles which have a relation to the process of law and protect a citizen in his or her private right, and guard him or her against the arbitrary action of the government.
U.S.—*Twining v. State of N.J.*, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (overruled in part on other grounds by, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).
(2) In the absence of an appropriate rule, there is no federal constitutional prohibition to the implementation of procedures designed to comply with due process dictates.
U.S.—*Boulware v. Battaglia*, 344 F. Supp. 889 (D. Del. 1972), *aff'd*, 478 F.2d 1398 (3d Cir. 1973).
- 12 U.S.—*Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970).
- Following own rules**
Implicit in the concept of due process is the requirement that the government must follow its own rules and that it must do so within a reasonable time.
U.S.—*Layton v. Swapp*, 484 F. Supp. 958 (D. Utah 1979).
- 13 U.S.—*Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
- Public policy**
A wise public policy may require that higher standards be adopted than those minimally tolerable under the Federal Constitution.
U.S.—*Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).
- Effect of violation**
A state may grant procedural rights that exceed the constitutional requirements, and a violation of those procedures by the State would be wrongful but would not offend the Federal Constitution.
U.S.—*U. S. ex rel. Hoss v. Cuyler*, 452 F. Supp. 256 (E.D. Pa. 1978).
- Federal due process not altered**
While states, in setting up their own system of criminal and administrative law, may provide greater protection than those guaranteed by the Federal Constitution, federal due process is not thereby altered.
U.S.—*Wills v. Slayton*, 372 F. Supp. 776 (E.D. Va. 1974).
- 14 U.S.—*Dohany v. Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).
As to trial by jury in criminal cases, see § 1710.
- Adjudicative phase of state juvenile court delinquency proceeding**
U.S.—*McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).
- 15 U.S.—*Dohany v. Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).
Ariz.—*Allen v. Graham*, 8 Ariz. App. 336, 446 P.2d 240 (1968).

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1875. Exercise of legislative power in conformity with due process guaranty, generally

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Generally, the law-making authority of a legislature must be exercised in conformity with the due process guaranty.

Generally, the law-making authority of a legislature must be exercised in conformity with the due process guaranty,¹ and the guaranty of due process is a restraint on the legislative will.² Although substantive due process precludes or limits the ability of a legislature to enact legislation at all in areas involving certain fundamental rights,³ due process of law presupposes law-making power and its exercise,⁴ and the constitutional provision is not an inhibition of legislation but of acts without law.⁵ The first step in a substantive due process analysis is to determine what individual right is affected by the disputed statute.⁶ The nature of the right will determine how much constitutional protection it will be given and, accordingly, the level of scrutiny which should be applied to the legislation.⁷ While due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, the criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.⁸

If an act of the legislature is authorized and promulgated by the inherent and reserved powers of the State and is enforced with due regard to, and observance of, the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with the due process guaranty.⁹ Accordingly, where the purpose is a legitimate function of government and the measures invoked are wholly reasonably and appropriate to that end, there is no invasion of the guaranty.¹⁰ Furthermore, when a law operates on all alike and does not subject individuals to arbitrary exercise of the government and provides a regular course of administration and enforcement, it generally satisfies the due process of law requirement.¹¹ However, since due process is a flexible concept, legislation held constitutional under the due process standard may later be found constitutionally deficient.¹²

Each case involving the question of whether a statute violates due process must be decided on the social and economic conditions that exist at the time the statute is enacted or when the case is decided.¹³ The guaranty must be upheld and given full force and effect by the courts insofar as they can do so without invading the legislative domain.¹⁴ While there is authority that the fact that a statute is unduly oppressive is not ground to overturn it under the Due Process Clause,¹⁵ there is also authority that when a statutory or legislative scheme utilizes a means to reach its end which is unduly harsh or exacts a penalty which may be deemed oppressive in light of the legitimate objectives sought to be achieved, it may be held to be violative of constitutional due process guaranties.¹⁶

Generally, when passing upon substantive due process claims, the judiciary must not substitute its judgment for that of the legislature,¹⁷ and in matters of economic legislation, the legislature must be accorded considerable deference under the due process standard.¹⁸ The Due Process Clause requires only that a statute be reasonably designed to accomplish its purposes, not that it be the best means of accomplishing them,¹⁹ and it cannot be used to strike regulatory laws merely because they may be unwise,²⁰ improvident,²¹ or out of harmony with a particular school of thought.²² Neither the wisdom of the law nor the availability of alternative, less drastic remedies is a proper factor for the court's consideration.²³

The Due Process Clause does not require that the legislature deal with every aspect of a problem at the same time²⁴ or solve all related ills at once.²⁵ Thus, legislative reform may take one step at a time²⁶ and even select one phase of one field and apply a remedy there, neglecting the others.²⁷ Accordingly, legislative reform may address itself to that phase of a problem which seems most acute to the legislative mind.²⁸ Furthermore, due process does not prohibit the legislature from anticipating and addressing problems which have not yet manifested themselves²⁹ as long as the problem is at least rationally conceivable.³⁰

Generally, due process does not require meticulous exactitude in making legislative classifications.³¹ Additionally, it does not demand logical tidiness,³² and no exact conformity to abstract correlation is required of legislation,³³ but the Federal Constitution is satisfied if the legislature responds to the practical living facts with which it deals³⁴ or if there is a close correspondence between the legislation and the goals it advances.³⁵ Moreover, it is enough to satisfy the Federal Constitution that in drawing legislative lines the principle of reason has not been disregarded,³⁶ and what degree of uniformity reason demands of a statute is a function of the complexity of the needs which the statute seeks to accommodate.³⁷

To satisfy the requirements of due process, the legislature must have power to act on the subject matter.³⁸ Apart from the presence or absence of a fundamental right, generally, in order to satisfy the requirements of due process, the legislative power must not be exercised in an unreasonable, arbitrary, capricious, or discriminatory manner.³⁹ Also, the act involved must have a reasonable relation to a proper legislative purpose.⁴⁰

Resolutions of legislature; legislative committees.

Due process requires that resolutions of a legislature meet the same basic requirements as laws.⁴¹ Generally, however, the legislative charter of a committee created by a legislature pursuant to resolution is not subject to the same strict due process standards by which a penal statute would be measured.⁴² A witness before a congressional committee is entitled, as a matter of due process, to an explanation of the pertinency of a question, if he or she asks for it although he or she may lose that right if he or she fails to make a timely objection.⁴³

Rule otherwise in judicial discretion.

The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process.⁴⁴

CUMULATIVE SUPPLEMENT

Cases:

As legislation adjusting the burdens and benefits of economic life, the presumption of total disability due to pneumoconiosis to a coal miner who can show that he had worked underground for at least 15 years and is suffering from a totally disabling respiratory or pulmonary impairment enjoys a presumption of constitutionality, and the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. [U.S.C.A. Const.Amend. 5](#); [Black Lung Benefits Act, § 411\(c\)\(4\)](#), [30 U.S.C.A. § 921\(c\)\(4\)](#). [Eastern Associated Coal Corp. v. Director, Office of Workers' Compensation Programs](#), 805 F.3d 502 (4th Cir. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 N.H.—[Opinion of the Justices](#), 117 N.H. 749, 379 A.2d 782 (1977).
N.J.—[Ballou v. State, Dept. of Civil Service](#), 148 N.J. Super. 112, 372 A.2d 333 (App. Div. 1977), judgment aff'd, 75 N.J. 365, 382 A.2d 1118 (1978).
Equal protection standard or test
(1) Although expressed in slightly different language, the standard used to determine whether a statute violates substantive due process is identical to the standard for assessing whether a statute denies equal protection.
Ill.—[People ex rel. Lumpkin v. Cassidy](#), 184 Ill. 2d 117, 234 Ill. Dec. 389, 703 N.E.2d 1 (1998).
(2) The tests for a violation of equal protection and of substantive due process are similar: one test deals with the rational basis for a statute or ordinance, while the other test deals with the arbitrariness of the statute or ordinance.
Wis.—[Thorp v. Town of Lebanon](#), 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 (2000).
Basic test; central concern
(1) The basic test of substantive due process is whether the government can justify the infringement of its legislative activity upon the rights and liberties of aggrieved parties.
U.S.—[Michigan Meat Ass'n v. Block](#), 514 F. Supp. 560 (W.D. Mich. 1981).
(2) Minimum due process is a central concern in all statutory provisions.
N.C.—[Albemarle Realty & Mortg. Co., Inc. v. Peoples Bank of Virginia Beach](#), 34 N.C. App. 481, 238 S.E.2d 622 (1977).
Local ordinances

Local ordinances are accorded the same Fifth Amendment due process analysis as state statutes.

U.S.—[Maher v. City of New Orleans](#), 516 F.2d 1051 (5th Cir. 1975).

Suspect statute

A statute which applies mandatory, fixed, substantial, and cumulative punitive sanctions against persons of disparate culpability is manifestly suspect under due process.

Cal.—[Hale v. Morgan](#), 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).

2 Neb.—[Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.](#), 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

Power and enactments of Congress

(1) Substantive due process is a limitation on all powers of Congress, including the war power.

U.S.—[Galvan v. Press](#), 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

(2) The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate, and, where applicable, permeates every valid enactment of that body.

U.S.—[Wong Yang Sung v. McGrath](#), 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950), judgment modified on other grounds, 339 U.S. 908, 70 S. Ct. 564, 94 L. Ed. 1336 (1950).

Public benefit

To characterize an act of Congress as conferring a "public benefit" does not immunize it from scrutiny under the Fifth Amendment.

U.S.—[Richardson v. Belcher](#), 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

3 R.I.—[State v. Manocchio](#), 448 A.2d 761 (R.I. 1982).

4 U.S.—[International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke](#), 339 U.S. 470, 70 S. Ct. 773, 94 L. Ed. 995, 57 Ohio L. Abs. 330, 13 A.L.R.2d 631 (1950); [Everson v. Board of Ed. of Ewing Tp.](#), 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

5 Vt.—[State v. Felch](#), 92 Vt. 477, 105 A. 23 (1918).

Obstruction of national policy

The provisions of the Fifth Amendment may not be invoked to obstruct a national policy which Congress has the power to adopt.

Tex.—[National Carloading Corp. v. Phoenix-El Paso Exp.](#), 142 Tex. 141, 176 S.W.2d 564 (1943).

6 N.C.—[In re Baby Girl Dockery](#), 128 N.C. App. 631, 495 S.E.2d 417 (1998).

7 N.C.—[In re Baby Girl Dockery](#), 128 N.C. App. 631, 495 S.E.2d 417 (1998).

8 U.S.—[County of Sacramento v. Lewis](#), 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

9 Tex.—[Lawton v. City of Austin](#), 404 S.W.2d 648 (Tex. Civ. App. Austin 1966), writ refused n.r.e., (Nov. 23, 1966).

Delegated powers

(1) Due process is satisfied where there has been a proper exercise of powers delegated in appropriate statutes.

Ala.—[Berry v. City of Huntsville](#), 47 Ala. App. 587, 259 So. 2d 269 (Civ. App. 1971).

(2) Both state and federal doctrines of substantive due process prohibit delegations of government policy-making power to private groups where a serious potential for self-serving action is created thereby.

N.J.—[Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.](#), 78 N.J. 144, 393 A.2d 278 (1978).

Intentional discriminatory enforcement

Although an act or statute may be valid on its face, intentional discriminatory enforcement thereof is constitutionally invalid.

U.S.—[U.S. v. Robinson](#), 311 F. Supp. 1063 (W.D. Mo. 1969).

10 N.J.—[Singer Sewing Mach. Co. v. New Jersey Unemployment Compensation Commission](#), 128 N.J.L. 611, 27 A.2d 889 (N.J. Sup. Ct. 1942), judgment *aff'd*, 130 N.J.L. 173, 31 A.2d 818 (N.J. Ct. Err. & App. 1943).

Little scope for Due Process Clause

If a statute is an appropriate means to a permitted end, there is little scope for operation of the Due Process Clause.

U.S.—[Virginian Ry. Co. v. System Federation No. 40](#), 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

11 Okla.—[Miller v. State](#), 1972 OK CR 327, 503 P.2d 886 (Okla. Crim. App. 1972).

12 Mich.—[Stanton v. Lloyd Hammond Produce Farms](#), 67 Mich. App. 279, 240 N.W.2d 773 (1976), judgment *aff'd*, 400 Mich. 135, 253 N.W.2d 114 (1977).

As to due process as flexible concept, generally, see § 1867.

- 13 Ala.—*Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938).
- 14 Fla.—*Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58 (1936).
- Discretion of Congress as to penalties**
In determining whether a statute denies due process of law, a court is not concerned with the possibility that the evil attacked might have been stamped out by more lenient measures since Congress has wide discretion in the imposition of penalties.
- U.S.—*Smolowe v. Delendo Corp.*, 136 F.2d 231, 148 A.L.R. 300 (C.C.A. 2d Cir. 1943).
- 15 Wash.—*In re Binding Declaratory Ruling of Dept. of Motor Vehicles*, 87 Wash. 2d 686, 555 P.2d 1361 (1976).
- Hardship**
The fact that a statute may create "hardship" for a person is not sufficient to establish a violation of due process.
- N.Y.—*People v. Fernandez*, 93 Misc. 2d 127, 402 N.Y.S.2d 940 (Sup 1978).
- 16 Cal.—*Perez v. City of San Bruno*, 27 Cal. 3d 875, 168 Cal. Rptr. 114, 616 P.2d 1287 (1980).
- 17 U.S.—*Franza v. Carey*, 518 F. Supp. 324 (S.D. N.Y. 1981).
- Ill.—*Fox v. Rosewell*, 55 Ill. App. 3d 860, 13 Ill. Dec. 570, 371 N.E.2d 287, 98 A.L.R.3d 1075 (1st Dist. 1977).
- Relation to evil**
So long as the law bears a rational relation to the evil which the State properly seeks to eliminate, it is not the court's function to substitute its judgment for that of the legislature.
- U.S.—*Atkins v. Clements*, 529 F. Supp. 735 (N.D. Tex. 1981).
- 18 W. Va.—*Wampler Foods, Inc. v. Workers' Compensation Div.*, 216 W. Va. 129, 602 S.E.2d 805 (2004).
- 19 Ill.—*Reed v. Farmers Ins. Group*, 188 Ill. 2d 168, 242 Ill. Dec. 97, 720 N.E.2d 1052 (1999).
- Wash.—*Gossett v. Farmers Ins. Co. of Washington*, 133 Wash. 2d 954, 948 P.2d 1264 (1997).
- Alternatives**
(1) The availability of less drastic remedial alternatives will not invalidate a statute as violative of due process.
- Cal.—*Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).
- (2) For due process purposes, the governmental action does not have to be the only alternative or even the best alternative for the procedure to be reasonable and constitutional.
- Mont.—*Montana Wildlife Federation v. Sager*, 190 Mont. 247, 620 P.2d 1189 (1980).
- Inequities**
The mere fact that inequities may occasionally arise does not provide a sufficient basis for striking down a statute as violative of due process.
- N.Y.—*Finkel, Nadler and Goldstein v. Levine*, 46 A.D.2d 196, 361 N.Y.S.2d 941 (3d Dep't 1974).
- 20 U.S.—*Peick v. Pension Ben. Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), judgment aff'd, 724 F.2d 1247 (7th Cir. 1983).
- Cal.—*Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).
- As to judicial inquiry into wisdom of legislation, generally, see § 426.
- No concern with wisdom of exercise of legislative judgment**
Cal.—*People v. Grant*, 195 Cal. App. 4th 107, 123 Cal. Rptr. 3d 840 (1st Dist. 2011).
- Imposition of views**
The Fourteenth Amendment gives the federal courts no power to impose upon the states their views of wise economic or social policy.
- U.S.—*Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).
- Court not super legislature**
A court does not sit as a "super legislature" weighing the wisdom, need, or general appropriateness of legislative policy.
- U.S.—*Milnot Co. v. Richardson*, 350 F. Supp. 221 (N.D. Ill. 1972).
- 21 U.S.—*Snell v. Wyman*, 281 F. Supp. 853 (S.D. N.Y. 1968), judgment aff'd, 393 U.S. 323, 89 S. Ct. 553, 21 L. Ed. 2d 511 (1969).
- 22 U.S.—*Snell v. Wyman*, 281 F. Supp. 853 (S.D. N.Y. 1968), judgment aff'd, 393 U.S. 323, 89 S. Ct. 553, 21 L. Ed. 2d 511 (1969).

- 23 Cal.—*Benson v. Kwikset Corp.*, 152 Cal. App. 4th 1254, 62 Cal. Rptr. 3d 284 (4th Dist. 2007), as modified
on denial of reh'g, (July 26, 2007).
- 24 U.S.—*Franza v. Carey*, 518 F. Supp. 324 (S.D. N.Y. 1981).
Mich.—*O'Donnell v. State Farm Mut. Auto. Ins. Co.*, 404 Mich. 524, 273 N.W.2d 829, 10 A.L.R.4th 958
(1979).
- All facets or entirety of problem**
(1) Due process does not require that the law address all facets of a problem.
U.S.—*Atkins v. Clements*, 529 F. Supp. 735 (N.D. Tex. 1981).
(2) The Federal Constitution does not require the legislature to address the entirety of any problem at one
time.
Fla.—*State v. Champe*, 373 So. 2d 874 (Fla. 1978).
- 25 Cal.—*Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).
- Creation of other problems**
An otherwise rational legislative response to given concern cannot be invalidated under Due Process Clause
merely because the chosen solution creates other problems while addressing the original concern; rather,
legislatures are generally free to consider and balance several interests in carrying out their legislative
responsibilities.
U.S.—*Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014), cert. denied, 135 S. Ct. 220, 190 L. Ed. 2d 133 (2014).
- 26 U.S.—*Moritz v. C. I. R.*, 469 F.2d 466 (10th Cir. 1972).
Minn.—*Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144 (1975).
- 27 U.S.—*Moritz v. C. I. R.*, 469 F.2d 466 (10th Cir. 1972).
- All possible situations**
A statute in the field of health care is not necessarily violative of due process of law simply because the
legislature has not provided for all possible situations in enacting reform legislation.
U.S.—*Rastetter v. Weinberger*, 379 F. Supp. 170 (D. Ariz. 1974), judgment aff'd, 419 U.S. 1098, 95 S. Ct.
767, 42 L. Ed. 2d 795 (1975).
- Hitting at one abuse**
The Fourteenth Amendment does not compel the legislature to prohibit all evils or none, and the legislature
may hit at one abuse which it has found even though it fails to strike at another.
Minn.—*Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144 (1975).
- 28 Minn.—*Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144 (1975).
- 29 U.S.—*Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F. Supp. 954 (D. Md. 1978).
- 30 U.S.—*Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F. Supp. 954 (D. Md. 1978).
- Reasons conceived, not proved**
For due process requirements, it is necessary only that the reasons for a statutory regulation be conceived,
it is not necessary that they be proved.
N.D.—*Snyder's Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy*, 219 N.W.2d 140 (N.D. 1974).
- 31 Ill.—*People v. Johnson*, 106 Ill. App. 3d 759, 62 Ill. Dec. 731, 436 N.E.2d 757 (3d Dist. 1982) (disapproved
of on other grounds by, *People v. Manuel*, 94 Ill. 2d 242, 68 Ill. Dec. 506, 446 N.E.2d 240 (1983)).
- As to due process with respect to legislative classification, generally, see § 1882.
- 32 U.S.—*Southway Discount Center, Inc. v. Moore*, 315 F. Supp. 617 (N.D. Ala. 1970).
N.D.—*Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973).
- 33 U.S.—*Southway Discount Center, Inc. v. Moore*, 315 F. Supp. 617 (N.D. Ala. 1970).
N.D.—*City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970).
- 34 U.S.—*Southway Discount Center, Inc. v. Moore*, 315 F. Supp. 617 (N.D. Ala. 1970).
N.D.—*Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973).
- 35 N.D.—*Hoff v. Berg*, 1999 ND 115, 595 N.W.2d 285 (N.D. 1999).
- 36 N.D.—*Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973).
- 37 N.D.—*Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973).
- 38 Neb.—*Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).
- Initial dependence**
Whether a statute is unconstitutional, as violative of the Fifth Amendment right to due process, depends
initially upon whether it is a proper subject matter for the exercise of legislative power.
U.S.—*Erie Navigation Co. v. U.S.*, 83 Cust. Ct. 47, 475 F. Supp. 160 (Cust. Ct. 1979).

Limitation of review

The scope of review under the Due Process Clause is limited to determining whether legislation is a proper subject of legislative power.

Colo.—[Gates Rubber Co. v. South Suburban Metropolitan Recreation and Park Dist.](#), 183 Colo. 222, 516 P.2d 436 (1973).

39 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Colo.—[Town of Dillon v. Yacht Club Condominiums Home Owners Association](#), 2014 CO 37, 325 P.3d 1032 (Colo. 2014).

Fla.—[Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.](#), 753 So. 2d 55 (Fla. 2000).

Ill.—[People ex rel. Klaeren v. Village of Lisle](#), 202 Ill. 2d 164, 269 Ill. Dec. 426, 781 N.E.2d 223 (2002).

Mont.—[Goble v. Montana State Fund](#), 2014 MT 99, 374 Mont. 453, 325 P.3d 1211 (2014).

As to rule as to police power, see § 1868.

Due process as protecting against arbitrary or capricious action

Haw.—[DW Aina Lea Development, LLC v. Bridge Aina Lea, LLC.](#), 134 Haw. 187, 339 P.3d 685 (2014).

Ind.—[Leone v. Commissioner, Indiana Bureau of Motor Vehicles](#), 933 N.E.2d 1244 (Ind. 2010).

R.I.—[State v. Germane](#), 971 A.2d 555 (R.I. 2009).

Test

(1) In determining whether a legislative act is arbitrary, capricious, and unreasonable, "arbitrary" is defined as a decisive but unreasoned action, and "capricious" is defined as not guided by a steady judgment or purpose; an enactment is not "arbitrary" if there is any reasonable basis for its enactment.

Ark.—[City of Lowell v. M & N Mobile Home Park, Inc.](#), 323 Ark. 332, 916 S.W.2d 95 (1996).

(2) The test for arbitrariness under the Due Process Clauses of the federal and state constitutions is whether the legislative enactment is reasonably related to a legitimate state interest.

Ariz.—[Baseline Liquors v. Circle K Corp.](#), 129 Ariz. 215, 630 P.2d 38, 41 A.L.R.4th 602 (Ct. App. Div. 1 1981).

(3) Whether a statute is palpably arbitrary and a plain abuse of power is a test of whether it denies due process of law.

Conn.—[State v. Sixth Taxing Dist.](#), 104 Conn. 192, 132 A. 561 (1926).

Fundamental fairness

A substantive due process challenge to an ordinance questions the fundamental fairness of an ordinance both generally and in the relationship of the particular ordinance to the particular property under the particular conditions existing at the time of the litigation.

N.H.—[Dow v. Town of Effingham](#), 148 N.H. 121, 803 A.2d 1059 (2002).

Fairest procedural safeguards

Substantive due process deals with protection from arbitrary legislative action even though a person who is sought to be deprived of his or her substantial right is afforded the fairest of procedural safeguards.

Minn.—[In re Linehan](#), 594 N.W.2d 867 (Minn. 1999).

40 § 1876.

41 Fla.—[In re Apportionment Law](#), 281 So. 2d 484 (Fla. 1973).

42 Pa.—[Com. ex rel. Carcaci v. Brandamore](#), 459 Pa. 48, 327 A.2d 1 (1974).

43 U.S.—[Yellin v. U.S.](#), 374 U.S. 109, 83 S. Ct. 1828, 10 L. Ed. 2d 778 (1963); [Deutch v. U.S.](#), 367 U.S. 456, 81 S. Ct. 1587, 6 L. Ed. 2d 963 (1961); [Barenblatt v. U.S.](#), 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959); [Watkins v. U.S.](#), 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957).

44 U.S.—[Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

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Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1876. Rational basis or strict scrutiny test for validity

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West's Key Number Digest

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When no fundamental right is involved in a substantive due process scrutiny of a law, the rational basis test is imposed, but when a fundamental right is affected, strict scrutiny is applied to a statute and it may be justified only if necessary to accomplish a compelling governmental interest.

When no fundamental right is involved in a substantive due process scrutiny of a law, the inquiry upon a substantive due process analysis parallels or is similar to an equal protection analysis.¹ Thus, in such a case, the rational basis test for substantive due process is imposed,² and the statute in question ordinarily is found to be consistent with the Due Process Clause if it meets the rational basis test,³ as where it is rationally related to a legitimate governmental end, interest, purpose, or objective.⁴ However, it is not required that the particular means chosen be the least restrictive⁵ or even less restrictive than others.⁶ Thus, where no fundamental right is involved, in reviewing a statute for a violation of substantive due process, the test is one of reasonableness,⁷ that is, the statute must bear a reasonable relation to a permissible legislative object or purpose.⁸

On the other hand, in reviewing statutes for substantive due process, cases involving fundamental civil rights are to be distinguished from cases involving economic and social legislation,⁹ and the due process test of the constitutionality of a statute that infringes upon a fundamental right is more than the ordinary one of a rational relationship to a valid state objective.¹⁰ In such a case, strict¹¹ or careful or close¹² scrutiny is applied in determining whether the statute denies due process, and when a fundamental right is affected, statutes or regulations may be justified only if necessary to accomplish a compelling or overriding governmental interest.¹³

In such a case, the defender of the statute, regulation, or practice bears the burden of showing that there is a compelling or substantial governmental interest in effectuating the limitation or denial of the individual interest,¹⁴ and that the particular limitation or denial is narrowly designed or drawn to effectuate such compelling or substantial governmental interest.¹⁵ Furthermore, in a strict scrutiny analysis of a statute subject to a substantive due process challenge, legislative conclusions are not taken at face value and do not obviate the need for judicial scrutiny.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

On rational basis review of due process challenge, question is not whether statutory provision precisely filters out those, and only those, who are in the factual position which generated legislative concern reflected in statute, nor is question whether provision filters out substantial part of class which caused legislative concern or whether it filters out more members of class than nonmembers; question is whether legislative body, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that expense and other difficulties of individual determinations justified inherent imprecision of a prophylactic rule. *Minn. Const. art. 1, § 7. Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020).

A statute challenged on due process grounds will survive rational basis review so long as it is rationally related to any conceivable legitimate state purpose. *U.S.C.A. Const. Amend. 14; McKinney's Const. Art. 1, § 6. American Economy Ins. Co. v. State*, 30 N.Y.3d 136, 65 N.Y.S.3d 94, 87 N.E.3d 126 (2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ala.—*Northington v. Alabama Dept. of Conservation and Natural Resources*, 33 So. 3d 560 (Ala. 2009).
Fla.—*State v. Robinson*, 873 So. 2d 1205 (Fla. 2004).
Mass.—*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006).
Mich.—*Phillips v. Mirac, Inc.*, 470 Mich. 415, 685 N.W.2d 174 (2004).
As to test of judicial analysis as to equal protection, see §§ 1275 to 1279.
Substantially same review
Where social legislation which does not burden fundamental rights is challenged, the standard of review under the Due Process and Equal Protection Clauses is substantially the same.
U.S.—*Rowe v. Fauver*, 533 F. Supp. 1239 (D.N.J. 1982).
Balancing; factors considered
(1) A substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interest furthered,

the degree of infringement, and the sensitivity of the government entity responsible for regulation to more carefully tailored alternative means of achieving its goals.

U.S.—*Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

(2) Substantive due process scrutiny of law involves the balancing of a myriad of interests, including the character of the right allegedly infringed, the extent of the infringement, the importance of the government interest at issue, and the government's consideration of a less burdensome alternative means to accomplish the same goal.

U.S.—*Atkins v. Clements*, 529 F. Supp. 735 (N.D. Tex. 1981).

(3) In determining whether legislation affecting protected economic interests or liberties denies substantive due process, the balance struck between individual rights and the public welfare must be reasonable and fair; factors which may be taken into account are the degree of burden which the legislation imposes, the importance of the right infringed upon, and the gravity of the conditions with which the legislation attempts to deal.

Ala.—*Mount Royal Towers, Inc. v. Alabama State Bd. of Health*, 388 So. 2d 1209 (Ala. 1980).

U.S.—*U.S. v. Hughes*, 632 F.3d 956 (6th Cir. 2011); *Kentner v. City of Sanibel*, 750 F.3d 1274 (11th Cir. 2014), cert. denied, 135 S. Ct. 950, 190 L. Ed. 2d 831 (2015).

Ala.—*Northington v. Alabama Dept. of Conservation and Natural Resources*, 33 So. 3d 560 (Ala. 2009).

Ill.—*People v. Johnson*, 225 Ill. 2d 573, 312 Ill. Dec. 350, 870 N.E.2d 415 (2007).

Iowa—*King v. State*, 818 N.W.2d 1, 283 Ed. Law Rep. 390 (Iowa 2012).

Mass.—*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006).

Minn.—*In re Individual 35W Bridge Litigation*, 806 N.W.2d 820 (Minn. 2011).

Mo.—*Roe v. Replogle*, 408 S.W.3d 759 (Mo. 2013).

Ohio—*Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).

Utah—*State v. Candedo*, 2010 UT 32, 232 P.3d 1008 (Utah 2010).

Federal statute imposing economic burdens

Where a federal statute imposing economic burdens is challenged on due process grounds, the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts; rather, the courts are charged simply with determining whether the congressional action was rational.

U.S.—*Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327 (Fed. Cir. 2001).

Nonpenal statute

Where a statute is nonpenal, the due process test is more easily met, especially when the statutes involved are conducive of the public good or welfare.

Iowa—*State, ex rel. Iowa Dept. of Health v. Van Wyk*, 320 N.W.2d 599 (Iowa 1982).

U.S.—*U. S. v. Lieb*, 462 F.2d 1161 (Temp. Emer. Ct. App. 1972).

U.S.—*Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

Ill.—*In re D.W.*, 214 Ill. 2d 289, 292 Ill. Dec. 937, 827 N.E.2d 466 (2005).

Iowa—*Crippen v. City of Cedar Rapids*, 618 N.W.2d 562 (Iowa 2000).

Me.—*Doe I v. Williams*, 2013 ME 24, 61 A.3d 718 (Me. 2013).

Ma.—*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006).

Pa.—*Nixon v. Com.*, 576 Pa. 385, 839 A.2d 277 (2003).

Legitimate penological interests

U.S.—*Ragland v. Angelone*, 420 F. Supp. 2d 507 (W.D. Va. 2006), aff'd, 193 Fed. Appx. 218 (4th Cir. 2006).

Economic and social welfare legislation

(1) In order to sustain economic legislation against a due process challenge under the rational basis test, it is sufficient if the legislation bears a rational relationship to a legitimate governmental interest.

Ill.—*Reed v. Farmers Ins. Group*, 188 Ill. 2d 168, 242 Ill. Dec. 97, 720 N.E.2d 1052 (1999).

(2) The standard for reviewing all substantive due process challenges under the state constitution to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of the government.

S.C.—*R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000).

Burden

Where a state provision does not violate a fundamental right, the burden is not upon the State to establish the rationality of its restriction but is upon the challenger to show that the restriction is wholly arbitrary.

U.S.—*Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979).

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Cost of compliance

Given a rational relationship between the legislative measure and the evil sought to be remedied, the cost of compliance argument is out of place in a federal due process analysis.

Mo.—*Mid-State Distributing Co. v. City of Columbia*, 617 S.W.2d 419 (Mo. Ct. App. W.D. 1981).

5 U.S.—*Dean Foods Co. v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection*, 478 F. Supp. 224 (W.D. Wis. 1979), on reargument, 504 F. Supp. 520 (W.D. Wis. 1980).

Ga.—*Old South Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869, 535 S.E.2d 751 (2000).

6 U.S.—*Dean Foods Co. v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection*, 478 F. Supp. 224 (W.D. Wis. 1979), on reargument, 504 F. Supp. 520 (W.D. Wis. 1980).

7 U.S.—*Evans v. City of Chicago*, 522 F. Supp. 789 (N.D. Ill. 1980).

8 Ill.—*Segers v. Industrial Com'n*, 191 Ill. 2d 421, 247 Ill. Dec. 433, 732 N.E.2d 488 (2000).

Iowa—*State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000).

Showing required

A party challenging the constitutional propriety of socioeconomic legislation under the reasonable-relation test must show that the legislative scheme is without "reasonable justification."

Mich.—*Davey v. Detroit Auto. Inter-Insurance Exchange*, 414 Mich. 1, 322 N.W.2d 541 (1982).

9 La.—*Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

10 U.S.—*North Carolina Ass'n for Retarded Children v. State of N.C.*, 420 F. Supp. 451 (M.D. N.C. 1976).

Stringent measure of protection

When a liberty interest is fundamental, the more stringent measure of substantive due process protection applies in deference to the important role which those liberties have historically held in American life.

U.S.—*U. S. ex rel. Hoss v. Cuyler*, 452 F. Supp. 256 (E.D. Pa. 1978).

11 Colo.—*Lorenz v. State*, 928 P.2d 1274 (Colo. 1996).

Idaho—*Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 28 P.3d 1006 (2001).

Iowa—*King v. State*, 818 N.W.2d 1, 283 Ed. Law Rep. 390 (Iowa 2012).

Wyo.—*Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995).

Test

(1) The standard test employed in strict scrutiny inquires as to whether the challenged legislation embodies a compelling state interest, and, if so, whether the means of accomplishing its objectives are necessary and the least restrictive means available.

Fla.—*Haire v. Florida Dept. of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004).

(2) A statute challenged on substantive due process grounds must be narrowly tailored to meet a compelling state interest to withstand the test of strict scrutiny.

Me.—*Green v. Commissioner of Mental Health and Mental Retardation*, 2000 ME 92, 750 A.2d 1265 (Me. 2000).

Wis.—*In re Termination of Parental Rights to Diana P.*, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344 (2005).

12 N.Y.—*Matter of Guardianship and Custody of Jonathan E. G.*, 107 Misc. 2d 900, 436 N.Y.S.2d 546 (Fam. Ct. 1980).

Tex.—*Thompson v. Texas State Bd. of Medical Examiners*, 570 S.W.2d 123 (Tex. Civ. App. Tyler 1978), writ refused n.r.e., (Feb. 14, 1979).

13 Ill.—*Village of Oak Lawn v. Marcowitz*, 86 Ill. 2d 406, 55 Ill. Dec. 916, 427 N.E.2d 36 (1981).

W. Va.—*Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 539 S.E.2d 446 (2000).

Appropriate due process analysis

Where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, a compelling state interest test employed in equal protection cases may be used to describe the appropriate due process analysis.

U.S.—*Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

14 N.J.—*Trombetta v. Mayor and Com'rs of City of Atlantic City*, 181 N.J. Super. 203, 436 A.2d 1349 (Law Div. 1981), judgment aff'd, 187 N.J. Super. 351, 454 A.2d 900 (App. Div. 1982).

Tex.—*Thompson v. Texas State Bd. of Medical Examiners*, 570 S.W.2d 123 (Tex. Civ. App. Tyler 1978), writ refused n.r.e., (Feb. 14, 1979).

Nonrecognition of presumption

If the particular individual interest limited or denied is fundamental, the court is required to refrain from recognizing any presumption that a sufficient reason exists for such limitation or denial.

U.S.—[Mabra v. Schmidt](#), 356 F. Supp. 620 (W.D. Wis. 1973).

15 N.J.—[Trombetta v. Mayor and Com'rs of City of Atlantic City](#), 181 N.J. Super. 203, 436 A.2d 1349 (Law Div. 1981), judgment aff'd, 187 N.J. Super. 351, 454 A.2d 900 (App. Div. 1982).

16 Fla.—[Haire v. Florida Dept. of Agriculture and Consumer Services](#), 870 So. 2d 774 (Fla. 2004).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1877. Conclusive or irrebuttable presumptions

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Statutes creating irrebuttable presumptions are disfavored under the due process clauses when they are not necessarily or universally true in fact and when the State has reasonable alternative means of making the crucial determination.

It has been broadly stated that a statutory scheme which creates irrebuttable presumptions which act to deprive persons of protected interests violates the Due Process Clause,¹ that legislation creating a conclusive presumption cannot withstand a due process attack,² that any legislative effort to make a stated fact conclusive as to both the propriety and verity of another fact constitutes a denial of due process,³ or that a statute cannot survive a due process challenge if it denies rights and benefits on the basis of facts presumed to exist and be true, without affording the individual an opportunity to defend those facts.⁴ Similarly, it has been said that a presumption in a civil case violates the Due Process Clause if it is arbitrary or operates to deny a fair opportunity to rebut it, as legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property.⁵

In more restrictive terms, however, it has been held that statutes creating irrebuttable presumptions are disfavored under the due process clauses⁶ when they are not necessarily or universally true in fact,⁷ as where the presumed fact does not necessarily follow from the proven fact,⁸ and when the State has reasonable alternative means of making the crucial determination.⁹ Thus, it has been held that a statutory presumption can be invalidated only when a two-pronged test is met: when the presumption is not necessarily or universally true and when the State has reasonable alternative means of making the crucial determination.¹⁰ Under some authority, the crucial question, from a due process point of view, arises in the second prong of the foregoing test, that is, are there reasonable alternative means of making the crucial determination?¹¹ Accordingly, it has been held that a conclusive presumption which is not necessarily or universally true in fact does not of itself violate due process where there is no reasonable alternative means of making the crucial determination¹² and, conversely, that such a presumption does violate due process where there are reasonable alternative means of making the crucial determination.¹³

In any event, as with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test¹⁴ or, in appropriate cases, strict scrutiny.¹⁵ Generally, the constitutional standard of rationality demands that the presumed element be more likely than not to flow from the proved fact on which it is made to depend.¹⁶ Thus, in order for a legislature to create a valid presumption, there must be a rational connection between the fact proved and the ultimate fact,¹⁷ and a statutory presumption violates due process if there is no rational connection between the facts established and the facts to be presumed.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

A constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment; the power to create presumptions is not a means of escape from constitutional restrictions. (Per Pollack, J., with one justice concurring and one justice concurring in result.) *State v. Won*, 136 Haw. 292, 361 P.3d 1195 (2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*McDonald v. McLucas*, 371 F. Supp. 837 (S.D. N.Y. 1973).
Ga.—*Cobb County School Dist. v. Barker*, 271 Ga. 35, 518 S.E.2d 126 (1999).
As to requirements of due process in connection with evidentiary presumptions, generally, see § 1961.
- 2 U.S.—*Owens v. Parham*, 350 F. Supp. 598 (N.D. Ga. 1972).
- 3 Okla.—*In re Hickory School Dist. D-3, Murray County*, 1969 OK 68, 454 P.2d 670 (Okla. 1969).
- 4 **Opportunity to rebut**
A state could not enact by legislation a factual presumption that resulted in a loss of property, without providing an opportunity to rebut the presumption.
U.S.—*Bjarsch v. DiFalco*, 300 F. Supp. 960 (S.D. N.Y. 1969).
- 5 Iowa—*Hensler v. City of Davenport*, 790 N.W.2d 569, 74 A.L.R.6th 645 (Iowa 2010).
- 6 Colo.—*People in People in Interest of S. P. B.*, 651 P.2d 1213 (Colo. 1982).
Neb.—*Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).
Rationale
Statutes creating irrebuttable presumptions are disfavored under the due process clauses because they preclude individualized determinations of fact upon which substantial rights or obligations may depend.

U.S.—*Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979).

Not automatic invalidation

The mere existence of a conclusive presumption does not automatically invalidate the statutory scheme; the inquiry, when such presumption is utilized by the legislature in the exercise of police power, is whether the presumption is irrational, arbitrary, and unreasonable.

Ill.—*Rawlings v. Illinois Dept. of Law Enforcement*, 73 Ill. App. 3d 267, 29 Ill. Dec. 333, 391 N.E.2d 758 (3d Dist. 1979).

U.S.—*Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979).

Cal.—*County of San Diego v. Brown*, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978).

U.S.—*Andrews v. Drew Municipal Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975).

Mich.—*Berry v. Michigan Racing Com'r*, 116 Mich. App. 164, 321 N.W.2d 880 (1982).

Cal.—*County of San Diego v. Brown*, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978).

Mich.—*Berry v. Michigan Racing Com'r*, 116 Mich. App. 164, 321 N.W.2d 880 (1982).

Colo.—*People in People in Interest of S. P. B.*, 651 P.2d 1213 (Colo. 1982).

Cal.—*County of San Diego v. Brown*, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978).

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Cal.—*County of San Diego v. Brown*, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978).

U.S.—*Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980).

Criterion for due process validity

The irrebuttable presumption doctrine creates, in effect, a legislative rule or classification, and if the classification is found to be motivated by a rational assumption held by the legislature for purposes of an equal protection review, it will also pass muster under the Due Process Clause.

U.S.—*McKay v. Horn*, 529 F. Supp. 847 (D.N.J. 1981).

When improper under due process

A presumption or conclusion that arises out of a state statute is improper under the Due Process Clause only when it is irrational, arbitrary, or unreasonable.

U.S.—*Edelberg v. Illinois Racing Bd.*, 540 F.2d 279 (7th Cir. 1976).

U.S.—*Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980).

All irrebuttable presumptions

All irrebuttable presumptions are not subjected to strict scrutiny under a due process analysis.

U.S.—*Moore v. Supreme Court of South Carolina*, 447 F. Supp. 527 (D.S.C. 1977), *aff'd*, 577 F.2d 735 (4th Cir. 1978).

Me.—*State v. McNally*, 443 A.2d 56 (Me. 1982).

Reasonable inference

Due process requires that proof of the fact upon which a statutory presumption is based must carry a reasonable inference of the ultimate fact presumed and that an inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

U.S.—*Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974).

Cal.—*Estate of McGowan*, 35 Cal. App. 3d 611, 111 Cal. Rptr. 39 (1st Dist. 1973).

Mich.—*Van Slooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704, 16 A.L.R.4th 1005 (1980) and *Craig v. Bickel*, 455 U.S. 901, 102 S. Ct. 1242, 71 L. Ed. 2d 440 (1982).

Inaccurate presumption

A conclusive statutory presumption may be inaccurate, and if it adversely affects the rights of individuals, it will be held invalid for a violation of due process.

U.S.—*Stewart v. Wohlgemuth*, 355 F. Supp. 1212 (W.D. Pa. 1972).

16C C.J.S. Constitutional Law § 1878

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1878. Retroactive or retrospective laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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The Due Process Clause generally does not prohibit retrospective civil legislation unless the consequences are particularly harsh and oppressive.

Retroactive civil legislation is subject to only modest constitutional limits.¹ There is a presumption against retroactive legislation, which finds expression in several provisions of the Constitution, including the Ex Post Facto Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause.² However, it has been said that when a court is called on to consider whether retroactive legislation is constitutional, its focus is on whether the retroactivity of the legislation denies due process.³

The Due Process Clause generally does not prohibit retrospective civil legislation,⁴ unless the consequences are particularly harsh and oppressive,⁵ or the retroactivity otherwise results in measurable unfairness,⁶ as where it is so unreasonable and arbitrary as to deny due process.⁷ A deprivation of the due process right of fair warning can result from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.⁸ Furthermore, retroactive application of a new substantive measure will conflict with constitutional principles if it deprives a person of a vested right without due process

of law.⁹ For a judicial reformation of the law to implicate due process concerns when it is retroactively applied, the change wrought upon a defendant's interests must be substantive, as opposed to procedural, and detrimental, as opposed to remedial.¹⁰ A "substantive law" prescribes legal duties and rights, and once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them.¹¹ However, not all expectations rise to the level of vested rights, interference with which through a statutory amendment is prohibited by the Due Process Clause.¹² The courts of the states are free to determine the extent to which new decisions are to have retrospective effect and that determination, regardless of its outcome, does not result automatically in the denial of due process or any other right protected by the Federal Constitution.¹³

In order to satisfy due process, the retroactive statute must have been enacted for a legitimate legislative purpose,¹⁴ and retroactively applying the statute must be a rational means to accomplish such purpose.¹⁵ Moreover, the constitutionality of retroactive legislation under the Due Process Clause is conditioned upon a rationality requirement beyond that applied to other legislation¹⁶ and the period of retroactivity must be moderate and confined to short and limited periods required by the practicalities of the legislation.¹⁷ Among the benign and legitimate purposes retroactivity of a statute may serve without violating the Due Process Clause is simply to give comprehensive effect to a new law Congress considers salutary where Congress has also determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.¹⁸ In any event, it is only where vested substantive rights of a party have been adversely affected that a statute can be said to operate retroactively,¹⁹ and it is only then that the court need analyze the nature of the governmental interest involved in order to determine whether the statute, as applied, violates due process.²⁰

In determining whether a retroactive law contravenes the Due Process Clause, the court considers such factors as the significance of the state interest served by the law,²¹ the importance of the retroactive application of the law to the effectuation of that interest,²² the extent of reliance upon the former law,²³ the legitimacy of that reliance,²⁴ the extent of the actions taken on the basis of that reliance,²⁵ and the extent to which retroactive application of the law would disrupt those actions.²⁶ For purposes of a due process analysis of the retroactive application of a statute, of primary concern is whether the retroactive statute unfairly overturns the challenger's settled expectation in any accrued rights.²⁷ Justification sufficient to validate a statute's prospective application under the Due Process Clause may not suffice to warrant its retroactive application.²⁸

Ultimately, the retroactive application of new legislation may offend due process if, upon balancing the considerations on both sides, it appears that retroactive application would be unreasonable.²⁹ It has been said in this regard that in comparing the public interest in a retroactive rule with the private interests that are overturned by it, the critical consideration is the extent to which the retroactive rule adversely affects the reasonable expectations of concerned parties.³⁰ The test of reasonableness includes an examination of the nature of the public interest motivating the statute's enactment, the nature of the rights affected retroactively, and the extent of the statute's impact on those rights.³¹ Ordinarily, only those retroactive statutes which, on a balancing of opposing considerations, are deemed to be unreasonable, are violative of due process.³² Under a variety of facts and circumstances, the courts have adjudicated questions with respect to whether particular statutes are or are not retroactive for the purposes of due process analysis,³³ or whether the retroactive application of particular statutes does or does not constitute a violation of the requirements of due process.³⁴

Imposition of new duty.

A retroactive change in the law that imposes a new duty is prohibited as a violation of due process, and the legislature is without authority to enact such a law even if that is its express intention.³⁵

CUMULATIVE SUPPLEMENT

Cases:

The principle that legislation usually applies only prospectively protects vital due process interests, ensuring that individuals have an opportunity to know what the law is before they act, and that they may rest assured after they act that their lawful conduct cannot be second-guessed later. [U.S. Const. Amend. 5. Opati v. Republic of Sudan, 140 S. Ct. 1601 \(2020\).](#)

Vital equal protection purposes are served by the principle that legislation usually applies only prospectively, because if legislative majorities could too easily make new laws with retroactive application, disfavored groups could become easy targets for discrimination, with their past actions visible and unalterable. [U.S. Const. Amend. 5. Opati v. Republic of Sudan, 140 S. Ct. 1601 \(2020\).](#)

Because foreign sovereign immunity is a gesture of grace and comity, it is also something that may be withdrawn retroactively without the same risk to due process and equal protection principles that other forms of backward-looking legislation can pose; foreign sovereign immunity's principal purpose has never been to permit foreign states to shape their conduct in reliance on the promise of future immunity from suit in United States courts. [U.S. Const. Amend. 5. Opati v. Republic of Sudan, 140 S. Ct. 1601 \(2020\).](#)

Due process clause protects interests in fair notice and repose that may be compromised by retroactive legislation; justification sufficient to validate statute's prospective application under due process clause may not suffice to warrant its retroactive application. [U.S.C.A. Const.Amend. 14. Bank Markazi v. Peterson, 136 S. Ct. 1310 \(2016\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—Holzsager v. District of Columbia Alcoholic Beverage Control Bd., 979 A.2d 52 \(D.C. 2009\).](#)
- 2 [U.S.—Carranza-De Salinas v. Holder, 700 F.3d 768 \(5th Cir. 2012\).](#)
- 3 [Ala.—Jefferson County Com'n v. Edwards, 49 So. 3d 685 \(Ala. 2010\).](#)
- 4 [U.S.—U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 \(1977\).](#)
[Or.—Hall v. Northwest Outward Bound School, Inc., 280 Or. 655, 572 P.2d 1007 \(1977\).](#)
 As to validity of retroactive and retrospective laws, generally, see §§ [645](#) to [660](#) et seq.
Customary congressional practice
 The enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation is the customary congressional practice, which the courts are loathe to reject when conducting the limited judicial review accorded economic legislation under the Fifth Amendment's Due Process Clause.
[U.S.—Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 \(1984\).](#)
[U.S.—U.S. v. Carlton, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 \(1994\); U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 \(1977\); Welch v. Henry, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A.L.R. 1142 \(1938\).](#)
[N.J.—Matter of Kaplan, 178 N.J. Super. 487, 429 A.2d 590 \(App. Div. 1981\).](#)
Arbitrary and irrational legislation
 Although retrospective civil legislation may offend due process if it is particularly harsh and oppressive, such standard does not differ from the prohibition against arbitrary and irrational legislation.
[U.S.—Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 \(1984\).](#)
- 6 [U.S.—Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 420 F. Supp. 162 \(S.D. Ala. 1976\).](#)

Unfairness or unreasonableness

A retroactive statute is unconstitutional under the due process clauses only if the statute is unfair or unreasonable.

Wash.—[Application of Santore](#), 28 Wash. App. 319, 623 P.2d 702 (Div. 2 1981).

U.S.—[In re Webber](#), 7 B.R. 580 (Bankr. D. Or. 1980), judgment aff'd, 674 F.2d 796 (9th Cir. 1982).

Curing defect

A jurisdictional defect in a judgment or proceeding cannot be cured by retroactive legislation without a denial of due process.

Md.—[Dryfoos v. Hostetter](#), 268 Md. 396, 302 A.2d 28 (1973).

Conn.—[State v. Moulton](#), 310 Conn. 337, 78 A.3d 55 (2013).

Cal.—[Strauss v. Horton](#), 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009), as modified, (June 17, 2009).

Ill.—[First of America Trust Co. v. Armstead](#), 171 Ill. 2d 282, 215 Ill. Dec. 639, 664 N.E.2d 36 (1996).

Wash.—[State v. Shultz](#), 138 Wash. 2d 638, 980 P.2d 1265 (1999).

Taking of property

Substantive laws affect vested rights, and as such, they are not subject to retrospective legislation which would constitute the taking of property without due process.

Kan.—[Northern Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.](#), 289 Kan. 777, 217 P.3d 966 (2009).

Judicial rights

The General Assembly may not arbitrarily, or without due process, by retroactive legislation terminate or impair the judicial rights of the litigant.

Ky.—[Jarvis v. National City](#), 410 S.W.3d 148 (Ky. 2013).

Haw.—[State v. Jess](#), 117 Haw. 381, 184 P.3d 133 (2008), as corrected, (Apr. 4, 2008).

Fla.—[Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc.](#), 127 So. 3d 1258 (Fla. 2013).

Ill.—[Dardeen v. Heartland Manor, Inc.](#), 186 Ill. 2d 291, 238 Ill. Dec. 30, 710 N.E.2d 827 (1999).

Conn.—[Denardo v. Bergamo](#), 272 Conn. 500, 863 A.2d 686 (2005).

U.S.—[U.S. v. Carlton](#), 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

Justifications

Although retroactive aspects of legislation, as well as prospective aspects, must meet the test of due process, and justifications for the latter may not suffice for the former, such burden is met simply by showing that the retroactive application of legislation is itself justified by a rational legislative purpose.

U.S.—[Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

U.S.—[U.S. v. Carlton](#), 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

U.S.—[Bowen v. Georgetown University Hosp.](#), 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).

U.S.—[U.S. v. Carlton](#), 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

U.S.—[District of Columbia v. Beretta U.S.A. Corp.](#), 940 A.2d 163 (D.C. 2008).

Mass.—[McCarthy v. Sheriff of Suffolk County](#), 366 Mass. 779, 322 N.E.2d 758 (1975).

Wis.—[In re Paternity of John R.B.](#), 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849 (2005).

Due process reach

Considerations of due process limit the reach of retroactive legislation that would otherwise impair vested rights.

Mich.—[Metro Homes, Inc. v. City of Warren](#), 19 Mich. App. 664, 173 N.W.2d 230 (1969).

Fla.—[Clausell v. Hobart Corp.](#), 515 So. 2d 1275 (Fla. 1987).

Mass.—[McCarthy v. Sheriff of Suffolk County](#), 366 Mass. 779, 322 N.E.2d 758 (1975).

Cal.—[In re Marriage of Bouquet](#), 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).

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Cal.—[In re Marriage of Bouquet](#), 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).

Decision disapproving prior authority

The retroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties denies due process.

- 25 Cal.—*Olszewski v. Scripps Health*, 30 Cal. 4th 798, 135 Cal. Rptr. 2d 1, 69 P.3d 927 (2003).
- 26 Cal.—*In re Marriage of Bouquet*, 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).
- 27 Cal.—*In re Marriage of Bouquet*, 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976).
- 28 Wis.—*In re Paternity of John R.B.*, 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849 (2005).
- 29 U.S.—*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
- 30 N.Y.—*Valladares v. Valladares*, 80 A.D.2d 244, 438 N.Y.S.2d 810 (2d Dep't 1981), order aff'd as modified on other grounds, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050 (1982) and aff'd in part, 55 N.Y.2d 388, 449 N.Y.S.2d 687, 434 N.E.2d 1054 (1982).
- 31 U.S.—*Cheshire Hosp. v. New Hampshire-Vermont Hospitalization Service, Inc.*, 689 F.2d 1112 (1st Cir. 1982).
- 32 Mass.—*Bird Anderson v. BNY Mellon, N.A.*, 463 Mass. 299, 974 N.E.2d 21 (2012).
- 33 Mass.—*Opinion of the Justices to the House of Representatives*, 423 Mass. 1244, 673 N.E.2d 36 (1996).
- Utah—*State v. Baker*, 935 P.2d 503 (Utah 1997) (overruled on other grounds by, *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52, 310 P.3d 1212 (Utah 2013)).
- Wis.—*State ex rel. Cannon v. Moran*, 107 Wis. 2d 669, 321 N.W.2d 550 (Ct. App. 1982), decision rev'd on other grounds, 111 Wis. 2d 544, 331 N.W.2d 369 (1983)..
- 34 Ky.—*Justice v. Com.*, 987 S.W.2d 306 (Ky. 1998).
- S.C.—*Rivers v. State*, 327 S.C. 271, 490 S.E.2d 261 (1997).
- Application not unexpected**
- State's judicial abrogation of common-law year-and-a-day rule, under which no defendant could be convicted of murder unless victim died within year and a day of defendant's act which caused death, could be applied retroactively without offending due process principle of fair warning since abrogation was not unexpected or indefensible; rule had been legislatively or judicially abolished in vast majority of jurisdictions which had recently addressed issue, did not exist as part of state's statutory criminal code, and had never served as ground of decision in any murder prosecution in state.
- U.S.—*Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).
- Creation of new substantial right**
- An employer's due process rights were violated by the retroactive application of amendments to a statute protecting an employee from being required to work in contravention of a sincerely held religious belief; the amendments removed the requirement that the employee's belief be shared by others belonging to an organized church or sect and thus created a new substantial right.
- Mass.—*Pielech v. Massasoit Greyhound, Inc.*, 441 Mass. 188, 804 N.E.2d 894 (2004).
- Correcting unexpected construction of statute**
- A statutory amendment providing that a parent corporation is an "employer" for purposes of severance pay liability did not violate the Due Process Clause because it furthered the legitimate legislative purpose of correcting an unexpected construction of the statute and did so by a rational means.
- Me.—*State v. L.V.I. Group*, 1997 ME 25, 690 A.2d 960 (Me. 1997).
- 35 **Under state constitution**
- Ill.—*Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83, 337 Ill. Dec. 884, 923 N.E.2d 735 (2010).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1879. Change in law

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The due process guaranty does not prohibit changes in the law which affect a person's rights as they existed at common law, and it does not forbid the creation of new rights or the abolition of old ones recognized by common law to obtain a permissible legislative object.

While the due process guaranty was not intended to abrogate the common law,¹ it is not to be construed so as to prevent the state and federal governments from adapting life to the continuous change in social and economic conditions.²

The due process guaranty does not prohibit changes in the law³ which affect a person's rights as they existed at common law,⁴ and it does not forbid the creation of new rights,⁵ or the abolition of old ones recognized by common law⁶ to obtain a permissible legislative object. However, when a party acquires a right to assert a cause of action prior to a change in the law, that right is a vested property right which is protected by the guarantee of due process.⁷

Footnotes

- 1 Ala.—[Huntsville Bank & Trust Co. v. Thompson](#), 212 Ala. 511, 103 So. 477 (1925).
- 2 Minn.—[McElhone v. Geror](#), 207 Minn. 580, 292 N.W. 414 (1940).
Beginning not forbidden
(1) The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between rights of an earlier and a later time.
U.S.—[Sperry & Hutchinson Co. v. Rhodes](#), 220 U.S. 502, 31 S. Ct. 490, 55 L. Ed. 561 (1911).
(2) The Fifth Amendment does not forbid statutory changes to have a beginning and thus to discriminate between rights of an earlier and a later time.
U.S.—[Miller v. Department of Health and Human Services](#), 517 F. Supp. 1192 (E.D. N.Y. 1981).
- 3 Kan.—[State ex rel. Schneider v. Liggett](#), 223 Kan. 610, 576 P.2d 221 (1978).
Wash.—[In re Carrier](#), 173 Wash. 2d 791, 272 P.3d 209 (2012).
Power to amend
The Fourteenth Amendment does not curtail the State's power to amend its laws, common or statutory, to conform to changes in public policy.
Wash.—[Seattle-First Nat. Bank v. Shoreline Concrete Co.](#), 91 Wash. 2d 230, 588 P.2d 1308 (1978).
Substantive right
The legislature may, consistent with the due process clauses, modify or abolish a substantive right if there appears a reasonable public purpose for that action.
Cal.—[Alameda Tank Co. v. Starkist Foods, Inc.](#), 103 Cal. App. 3d 428, 162 Cal. Rptr. 924 (2d Dist. 1980).
- 4 Kan.—[State ex rel. Schneider v. Liggett](#), 223 Kan. 610, 576 P.2d 221 (1978).
- 5 U.S.—[Adair v. Koppers Co., Inc.](#), 541 F. Supp. 1120 (N.D. Ohio 1982), judgment aff'd, 741 F.2d 111 (6th Cir. 1984).
- 6 U.S.—[Adair v. Koppers Co., Inc.](#), 541 F. Supp. 1120 (N.D. Ohio 1982), judgment aff'd, 741 F.2d 111 (6th Cir. 1984).
Rights in rules of common law
Substantive due process does not mean that there are vested rights in particular rules of common law.
U.S.—[Sanner v. Trustees of Sheppard and Enoch Pratt Hospital](#), 278 F. Supp. 138 (D. Md. 1968), judgment aff'd, 398 F.2d 226 (4th Cir. 1968).
Constitutional rights distinguished
Common-law rights can be abrogated by a statute in the exercise of the State's police powers subject only to due process requirements; on the other hand, constitutional rights cannot be so abrogated.
N.Y.—[Eichner v. Dillon](#), 73 A.D.2d 431, 426 N.Y.S.2d 517 (2d Dep't 1980), order modified on other grounds, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981).
- 7 La.—[Bourgeois v. A.P. Green Indus., Inc.](#), 783 So. 2d 1251 (La. 2001).
Retroactive or retrospective laws, see § 1878.

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

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§ 1880. Vagueness

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A vague or uncertain statute does not meet the requirements of due process. Under due process principles, laws which regulate persons or entities must give fair notice of the conduct that is forbidden or required, and provide explicit, proper, or sufficient standards for their enforcement.

Generally, due process of law in legislation requires certainty, clearness, concreteness, and definiteness,¹ and a vague or uncertain statute does not meet the requirements of due process,² as where it is so vague and indefinite as really to be no rule or standard at all.³ While the mere fact that a regulation requires interpretation does not make it vague in violation of due process,⁴ a legislative act that is so vague, indefinite, and uncertain that the courts are unable, by accepted rules of construction, to determine with any reasonable degree of certainty what the legislature intended will be declared to be void pursuant to due process.⁵

A vague law violates the first essential of due process,⁶ that is, the notion of fair notice or warning.⁷ Under due process principles, laws which regulate persons or entities must give fair notice of the conduct that is forbidden or required⁸ so that a person of ordinary intelligence is given a reasonable opportunity to know what is prohibited⁹ and so that the statute does not operate to

trap the innocent.¹⁰ Due process requires that a statute be not so vague that persons of common or ordinary intelligence must necessarily guess as to its meaning;¹¹ if an act of the legislature is so incomplete, vague, indefinite, or uncertain that persons of common intelligence must necessarily guess at its meaning and as to its application, it denies due process of law.¹²

In addition to satisfying the requirements as to notice, in order to withstand a vagueness challenge, a statute must provide explicit, proper, or sufficient standards,¹³ stated with adequate clarity,¹⁴ or have ascertainable standards,¹⁵ or contain reasonably clear¹⁶ or sufficient¹⁷ guidelines,¹⁸ or otherwise mark sufficiently distinct boundaries.¹⁹ Generally, such requirements as to standards, guidelines, and boundaries are necessary to provide for uniform application of the law²⁰ and its fair administration²¹ and, more particularly, to provide a means by which a violation of the statute may be fairly and nonarbitrarily determined²² and to prevent arbitrariness²³ or discrimination²⁴ in its enforcement.

In any event, however, due process requires only that a statute convey a sufficiently definite warning as to proscribed conduct when measured by common understanding or practice.²⁵ Moreover, the lack of precision is not of itself offensive to the requirement of due process,²⁶ and, under the guaranty, reasonable precision²⁷ or certainty²⁸ is all that is required. Thus, a statute is not void for vagueness simply because it requires conformity to an imprecise normative standard²⁹ because of difficulty in determining whether certain marginal activities fall within the scope of the statutory regulations,³⁰ or if any reasonable and practical construction can be given its language,³¹ or if its terms may be made reasonably certain by reference to other definable sources.³²

Due process does not require state courts to follow the United States Supreme Court's custom of going back of an act to explore its legislative history and determine the legislative intent.³³ There is no due process prohibition on the enactment of legislation which requires definitions to be provided by the judiciary,³⁴ and statutes or regulations in which the trier of fact must on occasion determine the question of reasonableness are not so vague as to deny due process.³⁵

CUMULATIVE SUPPLEMENT

Cases:

To not be void for vagueness under Fifth Amendment due process, laws that regulate persons or entities must be sufficiently clear that those enforcing the law do not act in an arbitrary or discriminatory way; an unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, or permits them to prescribe the sentences or sentencing range available. [U.S.C.A. Const.Amend. 5. Beckles v. U.S., 137 S. Ct. 886 \(2017\).](#)

A statute is unconstitutionally vague under the Due Process Clause only if it cannot be construed in a way that eliminates the vagueness problem. [U.S.C.A. Const.Amend. 14. Expressions Hair Design v. Schneiderman, 808 F.3d 118 \(2d Cir. 2015\).](#)

Religious advocate, seeking preliminary injunction preventing state fair officials from prohibiting him from engaging in speech immediately outside fairgrounds, failed to establish a reasonable probability of success on his claim that unwritten fair rules against speech impeding flow of people and speech on signs attached to a pole or stick that could be used as a weapon were unconstitutionally vague under the Due Process Clause; even if vagueness doctrine applied, despite fact that violation of rules triggered neither criminal liability nor a civil monetary penalty, but only ejection from fair, advocate was not likely to succeed on his claim whatever level of precision might be required for rules to satisfy due process, since he sought prospective injunctive relief, he now had clear notice of rules, terms of rules were clear in their application to his proposed activities, and rules were

not standardless, but provided the requisite minimal guidelines to govern law enforcement. [U.S. Const. Amend. 14. Powell v. Ryan, 855 F.3d 899 \(8th Cir. 2017\).](#)

In considering vagueness challenges under Due Process Clause, court must acknowledge that, condemned to use of words, it can never expect mathematical certainty from language, and consider extent to which more definite law is simply not possible. [U.S. Const. Amend. 5. United States v. Lucero, 989 F.3d 1088 \(9th Cir. 2021\),](#) for additional opinion, see, [2021 WL 835364 \(9th Cir. 2021\).](#)

In considering whether ordinance is void for vagueness under Due Process Clause, court starts with ordinance's language, but must also consider any narrowing construction courts have given it, as well as interpretations that court below has given to analogous statutes, and, perhaps to some degree, to interpretation of statute given by those charged with enforcing it. [U.S. Const. Amend. 14. Harmon v. City of Norman, Oklahoma, 981 F.3d 1141 \(10th Cir. 2020\).](#)

A fundamental principle in the legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required, in order to comport with the Due Process Clause. [U.S. Const. Amend. 5. Karem v. Trump, 960 F.3d 656 \(D.C. Cir. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

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[Ill.—Polyvend, Inc. v. Puckorius, 77 Ill. 2d 287, 32 Ill. Dec. 872, 395 N.E.2d 1376, 7 A.L.R.4th 1185 \(1979\).](#)
[N.Y.—Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82, 668 N.E.2d 1376 \(1996\).](#)

Basis

The underlying principle of the due process requirement of certainty and definiteness is that no one shall be held responsible for behavior which he or she could not reasonably understand to be proscribed.
[U.S.—Suddarth v. Slane, 539 F. Supp. 612 \(W.D. Va. 1982\).](#)

Detailed plan and specifications

A statute to be sufficiently certain so as to accord with constitutional standards of due process need not furnish a detailed plan and specifications of acts or conduct prohibited since impossible standards are not required.
[Fla.—Wells v. State, 402 So. 2d 402 \(Fla. 1981\).](#)

Criminal statutes

The requirement that all criminal statutes be clear and unambiguous is essentially a due process concept grounded in notions of fair play.
[N.J.—State v. Kittrell, 145 N.J. 112, 678 A.2d 209 \(1996\).](#)

Noncriminal statutes

(1) Civil statutes are required to demonstrate a lesser degree of specificity than are criminal statutes.
[Conn.—Seals v. Hickey, 186 Conn. 337, 441 A.2d 604 \(1982\).](#)

(2) Even if more specific language could be devised, the absence of criminal sanctions requires less literal exactitude for a noncriminal statute, challenged as being unconstitutionally vague, to comport with due process; unless the statute clearly, palpably, and without doubt infringes upon the Constitution, it will be upheld.
[Iowa—Millsap v. Cedar Rapids Civil Service Com'n, 249 N.W.2d 679 \(Iowa 1977\).](#)

Judicial review

Where one is deprived of liberty or property for violating a statutory prohibition, due process requires that the prohibition be explicit enough to allow for meaningful judicial review.
[Colo.—LDS, Inc. v. Healy, 197 Colo. 19, 589 P.2d 490 \(1979\).](#)
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[U.S.—Hunt v. City of Los Angeles, 638 F.3d 703 \(9th Cir. 2011\).](#)
[Ala.—Custard Ins. Adjusters, Inc. v. Youngblood, 686 So. 2d 211 \(Ala. 1996\).](#)

La.—[State v. Sandifer](#), 679 So. 2d 1324 (La. 1996).

Md.—[Todd v. State](#), 161 Md. App. 332, 868 A.2d 944 (2005).

Due process requires invalidation of impermissibly vague laws

U.S.—[F.C.C. v. Fox Television Stations, Inc.](#), 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).

"Vagueness" doctrine is an outgrowth of the Due Process Clause

U.S.—[U.S. v. Williams](#), 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

Procedural due process issues

Vagueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct.

Utah—[State v. MacGuire](#), 2004 UT 4, 84 P.3d 1171 (Utah 2004).

Fifth and Fourteenth Amendments

(1) The doctrine of vagueness is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments.

U.S.—[Postscript Enterprises, Inc. v. Whaley](#), 658 F.2d 1249 (8th Cir. 1981).

(2) The vagueness doctrine applies to enactments of state legislatures under the Due Process Clause of the Fourteenth Amendment.

Conn.—[Keogh v. City of Bridgeport](#), 187 Conn. 53, 444 A.2d 225 (1982).

Civil provisions

The mere fact that statutory provisions are civil and not criminal does not save them from scrutiny under the vagueness doctrine; rather, it is nature of the individual interest involved that governs the right to due process.

Mass.—[Custody of a Minor](#), 378 Mass. 712, 393 N.E.2d 379 (1979).

Showing required

A law may be challenged on its face as unduly vague, in violation of due process; however, to succeed, the complainant must demonstrate the law is impermissibly vague in all of its applications.

U.S.—[Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.](#), 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Nev.—[In re T.R.](#), 119 Nev. 646, 80 P.3d 1276 (2003).

Test

The test of a statute's vagueness for due process purposes is to be made with respect to the actual conduct of the actor who attacks the statute, and not with respect to hypothetical situations at the periphery of the statute's scope or with respect to the conduct of other parties who might not be forewarned by the broad language of the statute.

U.S.—[diLeo v. Greenfield](#), 541 F.2d 949 (2d Cir. 1976).

3 U.S.—[Exxon Corp. v. Busbee](#), 644 F.2d 1030 (5th Cir. 1981).

Ala.—[BP Exploration & Oil, Inc. v. Hopkins](#), 678 So. 2d 1052 (Ala. 1996).

4 U.S.—[National Organization for Marriage v. Daluz](#), 654 F.3d 115 (1st Cir. 2011).

5 Ill.—[Unzicker v. Kraft Food Ingredients Corp.](#), 203 Ill. 2d 64, 270 Ill. Dec. 724, 783 N.E.2d 1024 (2002).

6 Miss.—[Leuer v. City of Flowood](#), 744 So. 2d 266 (Miss. 1999).

Wash.—[Stastny v. Board of Trustees of Central Washington University](#), 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).

7 Iowa—[ABC Disposal Systems, Inc. v. Department Of Natural Resources](#), 681 N.W.2d 596 (Iowa 2004).

N.D.—[State v. Eldred](#), 1997 ND 112, 564 N.W.2d 283 (N.D. 1997).

Construction or interpretation; application of statute

(1) The application of a detailed statute may violate the notice requirement of due process when it is retroactively expanded by a surprising judicial construction particularly where the conduct construed to be prohibited cannot be deemed improper or immoral.

U.S.—[U.S. v. Newball](#), 524 F. Supp. 715 (E.D. N.Y. 1981).

(2) The fact that a statute has been judicially interpreted and applied to a set of facts generally provides sufficient notice to satisfy due process requirements and precludes an attack on the basis of vagueness.

Ariz.—[Dassinger v. Oden](#), 124 Ariz. 551, 606 P.2d 41 (Ct. App. Div. 1 1979).

8 U.S.—[F.C.C. v. Fox Television Stations, Inc.](#), 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012); [Vermont Right to Life Committee, Inc. v. Sorrell](#), 758 F.3d 118 (2d Cir. 2014).

Ga.—[Franklin v. State](#), 279 Ga. 150, 611 S.E.2d 21 (2005).

Mont.—[State v. G'Stohl](#), 2010 MT 7, 355 Mont. 43, 223 P.3d 926 (2010).

Neb.—[State, Dept. of Roads v. Mayhew Products Corp.](#), 211 Neb. 300, 318 N.W.2d 280 (1982).

Duty definite enough to serve as guide

A statute is not vague, and therefore does not violate due process, if the duty imposed by the statute is set forth in terms definite enough to serve as a guide to those who must comply with it.

Ill.—[People ex rel. Sherman v. Cryns](#), 203 Ill. 2d 264, 271 Ill. Dec. 881, 786 N.E.2d 139 (2003).

Applicability of theory

The theory that a vague statute may violate due process due to a lack of adequate notice has application only where there is a regulation of or sanction for such conduct.

Ariz.—[CAVCO Industries v. Industrial Commission of Arizona](#), 129 Ariz. 429, 631 P.2d 1087 (1981).

Ignorance of law

A person cannot claim a violation of notice requirements of due process of law based on that individual's failure to apprise himself or herself of the whole law rather than reading only a portion thereof; ignorance of the law, whether negligent or intentional, is no excuse.

U.S.—[LaBauve v. Louisiana Wildlife & Fisheries Commission](#), 444 F. Supp. 1370 (E.D. La. 1978).

Mathematical exactitude or certainty

Due process of law does not require mathematical exactitude or certainty in legislative draftsmanship to survive a vagueness challenge.

Ill.—[People v. Warren](#), 173 Ill. 2d 348, 219 Ill. Dec. 533, 671 N.E.2d 700 (1996).

Commonly understood, or common-law, meaning

(1) Any word or phrase used in an ordinance that has a commonly understood meaning is sufficiently definite to satisfy due process requirements, and thus is not considered vague.

Ga.—[Franklin v. State](#), 279 Ga. 150, 611 S.E.2d 21 (2005).

(2) Where a statute employs words of long usage or with common-law meaning, it will be considered sufficiently certain for purposes of meeting the notice requirement of due process.

Cal.—[In re J. T.](#), 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1st Dist. 1974).

Ill.—[People v. Wilson](#), 214 Ill. 2d 394, 292 Ill. Dec. 887, 827 N.E.2d 416 (2005).

Tex.—[Sanchez v. State](#), 995 S.W.2d 677 (Tex. Crim. App. 1999).

W. Va.—[State ex rel. Appleby v. Recht](#), 213 W. Va. 503, 583 S.E.2d 800 (2002).

Basis of challenge

The "vagueness doctrine" challenges the language of a regulation on the grounds that a person of ordinary intelligence would have to guess whether his or her conduct is proscribed by the regulation.

U.S.—[Suddarth v. Slane](#), 539 F. Supp. 612 (W.D. Va. 1982).

Clear definition of prohibitions

It is a basic principle of due process that an ordinance is unconstitutionally vague if its prohibitions are not clearly defined.

Ga.—[Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.](#), 266 Ga. 393, 467 S.E.2d 875 (1996).

Warning in language that the common world will understand

One of the fundamental requirements of fairness implicit within due process is a warning in language that the common world will understand of what the law intends to do if a certain line is passed, and the regulation under which the sanction is imposed must itself provide specific notice; its scope cannot depend on the subjective appraisal of those involved.

U.S.—[Wright v. Arkansas Activities Ass'n \(AAA\)](#), 501 F.2d 25 (8th Cir. 1974).

Test; leeway allowed

"Common intelligence" is the test of that which is fair warning for purposes of the due process requirement that people be given notice of that which is prohibited, but in the field of regulatory statutes governing business activities, a greater leeway is allowed in applying such test.

Wash.—[State v. Reader's Digest Ass'n, Inc.](#), 81 Wash. 2d 259, 501 P.2d 290 (1972) (holding modified on other grounds by, [Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.](#), 105 Wash. 2d 778, 719 P.2d 531 (1986)).

Understandable meaning

(1) Implicit in the constitutional safeguard protecting a person against government imposed burdens except in accordance with valid laws of the land is the premise that the law must be one that carries an understandable meaning.

U.S.—[Giaccio v. State of Pa.](#), 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966).

(2) A statute which is defined in terms so vague as to render it incomprehensible to a person of ordinary intelligence violates due process.

Alaska—*State v. Walton*, 133 Ariz. 282, 650 P.2d 1264 (Ct. App. Div. 1 1982).

Wyo.—*Travelocity.com LP v. Wyoming Dept. of Revenue*, 2014 WY 43, 329 P.3d 131 (Wyo. 2014).

N.Y.—*Pringle v. Wolfe*, 88 N.Y.2d 426, 646 N.Y.S.2d 82, 668 N.E.2d 1376 (1996).

S.D.—*State v. Krahwinkel*, 2002 SD 160, 656 N.W.2d 451 (S.D. 2002).

Wash.—*State v. Glas*, 147 Wash. 2d 410, 54 P.3d 147 (2002).

U.S.—*Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Connally v. General Const. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

Cal.—*People v. Katrinak*, 136 Cal. App. 3d 145, 185 Cal. Rptr. 869 (2d Dist. 1982).

Uncertainty as to prohibited conduct

U.S.—*City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

Coequal dangers considered

On a contention of vagueness, the court considers two, coequal dangers inherent in vague enactments, i.e., lack of notice to potential offenders and standardless enforcement.

U.S.—*Levas and Levas v. Village of Antioch, Ill.*, 684 F.2d 446 (7th Cir. 1982).

U.S.—*Giaccio v. State of Pa.*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966).

Pa.—*Com. v. Mayfield*, 574 Pa. 460, 832 A.2d 418 (2003).

Reasonable and intelligible standards

(1) The due process clauses of the state and federal constitutions require that a statute provide reasonable and intelligible standards to guide future conduct of individuals and to allow the courts and enforcement officials to effectuate the legislative intent in applying the laws.

Me.—*Maine Real Estate Commission v. Kelby*, 360 A.2d 528 (Me. 1976).

(2) Standards of reasonableness are consonant with due process when they can be judged by a common standard of conduct.

Mont.—*Rierson v. State*, 188 Mont. 522, 614 P.2d 1020 (1980), on reh'g, 191 Mont. 66, 622 P.2d 195 (1981).

Scope of conduct

When state action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid an unwarranted intrusion on those rights.

Utah—*In re Boyer*, 636 P.2d 1085 (Utah 1981).

Specificity supplied by court

Vague legislative standards may be safe from a due process violation if the needed specificity has been supplied by the court.

Vt.—*Rutherford v. Best*, 139 Vt. 56, 421 A.2d 1303 (1980).

U.S.—*Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Conn.—*State v. Anonymous*, 179 Conn. 155, 425 A.2d 939 (1979).

Ariz.—*Herrera v. Jamieson*, 124 Ariz. 133, 602 P.2d 514 (Ct. App. Div. 2 1979).

Neb.—*Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980).

U.S.—*International Soc. for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978).

Conn.—*State v. Russo*, 38 Conn. Supp. 426, 450 A.2d 857 (Super. Ct. 1982).

Determinate guidelines for law enforcement

The Due Process Clause requires that a law be specific enough to establish determinate guidelines for law enforcement.

Tex.—*Sanchez v. State*, 995 S.W.2d 677 (Tex. Crim. App. 1999).

Minimal guidelines to govern law enforcement

Mont.—*State v. G'Stohl*, 2010 MT 7, 355 Mont. 43, 223 P.3d 926 (2010).

Conn.—*State v. Anonymous*, 179 Conn. 155, 425 A.2d 939 (1979).

N.Y.—*Wegman's Food Markets, Inc. v. State*, 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980).

Cal.—*In re Marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (4th Dist. 1972).

Rationale

A vague disciplinary rule offends the Due Process Clause because it impermissibly delegates basic policy matters to officials charged with enforcement for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.

U.S.—[Hirschkop v. Snead](#), 594 F.2d 356 (4th Cir. 1979).

21 Conn.—[State v. Anonymous](#), 179 Conn. 155, 425 A.2d 939 (1979).

N.Y.—[Wegman's Food Markets, Inc. v. State](#), 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980).

22 Neb.—[State, Dept. of Roads v. Mayhew Products Corp.](#), 211 Neb. 300, 318 N.W.2d 280 (1982).

Absence of standards or criteria

A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges free to decide, without legally fixed criteria, when an individual must suffer the imposition of burdens or the forfeiture of rights.

La.—[State in Interest of Hunter](#), 387 So. 2d 1086 (La. 1980).

23 U.S.—[Cunney v. Board of Trustees of Village of Grand View](#), N.Y., 660 F.3d 612 (2d Cir. 2011); [Bell v. Keating](#), 697 F.3d 445 (7th Cir. 2012).

Wash.—[State v. Rhodes](#), 92 Wash. 2d 755, 600 P.2d 1264 (1979) (overruled on other grounds by, [State v. Baldwin](#), 150 Wash. 2d 448, 78 P.3d 1005 (2003)).

Wyo.—[Travelocity.com LP v. Wyoming Dept. of Revenue](#), 2014 WY 43, 329 P.3d 131 (Wyo. 2014).

Reliance on weaker factors

Where to save an enactment from a vagueness challenge the enactment contains factors that the court or other authority should consider in its enforcement, the remote chance that the weaker factors will be relied on does not sustain a facial vagueness attack.

U.S.—[Levas and Levas and Levas v. Village of Antioch, Ill.](#), 684 F.2d 446 (7th Cir. 1982).

Rational and reasonable execution

Statutory language must be sufficiently definite so that those who are to execute the law may do so in a rational and reasoned manner.

Ariz.—[Cohen v. State](#), 121 Ariz. 6, 588 P.2d 299 (1978).

When not proper consideration

Arbitrary enforcement is not a proper due process consideration where a statute is challenged as vague not on its face but as applied.

Alaska—[State v. O'Neill Investigations, Inc.](#), 609 P.2d 520 (Alaska 1980).

24 U.S.—[Bell v. Keating](#), 697 F.3d 445 (7th Cir. 2012).

Conn.—[State v. Russo](#), 38 Conn. Supp. 426, 450 A.2d 857 (Super. Ct. 1982).

Ga.—[In re K.R.S.](#), 284 Ga. 853, 672 S.E.2d 622 (2009).

Wash.—[State v. Rhodes](#), 92 Wash. 2d 755, 600 P.2d 1264 (1979) (overruled on other grounds by, [State v. Baldwin](#), 150 Wash. 2d 448, 78 P.3d 1005 (2003)).

Wyo.—[Travelocity.com LP v. Wyoming Dept. of Revenue](#), 2014 WY 43, 329 P.3d 131 (Wyo. 2014).

Encouragement of seriously discriminatory enforcement

U.S.—[Vermont Right to Life Committee, Inc. v. Sorrell](#), 758 F.3d 118 (2d Cir. 2014).

Magnification of potential

A vague statute violates due process, in part, because it magnifies the potential for discriminatory enforcement.

U.S.—[Casbah, Inc. v. Thone](#), 512 F. Supp. 474 (D. Neb. 1980), judgment aff'd in part, rev'd in part on other grounds, 651 F.2d 551 (8th Cir. 1981).

25 Iowa—[Incorporated City of Denison v. Clabaugh](#), 306 N.W.2d 748 (Iowa 1981).

Sufficiency of warning

The legislature need only give such warning that persons may conduct themselves or their affairs accordingly.

Iowa—[Amana Soc. v. Colony Inn, Inc.](#), 315 N.W.2d 101 (Iowa 1982).

26 Conn.—[State v. Anonymous](#), 179 Conn. 155, 425 A.2d 939 (1979).

D.C.—[Matter of Adoption of J. S. R.](#), 374 A.2d 860 (D.C. 1977).

Clearer and more precise language

A statute is not unconstitutionally vague merely because clearer and more precise language might have been used.

Mont.—[Rierson v. State](#), 188 Mont. 522, 614 P.2d 1020 (1980), on reh'g, 191 Mont. 66, 622 P.2d 195 (1981).

Hypothetical situations

A statute is not rendered unconstitutionally vague merely because the imagination can conjure up hypothetical situations in which the meaning of some terms may be in question.

Ill.—[Scott v. Department of Commerce and Community Affairs](#), 84 Ill. 2d 42, 48 Ill. Dec. 560, 416 N.E.2d 1082 (1981).

Required degree of vagueness

(1) In order to constitute a deprivation of due process, the statute must be so vague and indefinite as really to be no rule or standard at all.

U.S.—[State Farm Mut. Auto. Ins. Co. v. Bates](#), 542 F. Supp. 807 (N.D. Ga. 1982).

(2) Absent First Amendment issues or other constitutionally protected conduct, the party complaining of vagueness must prove that the enactment is vague not in the sense that it requires a person to conform his or her conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

U.S.—[Levas and Levas v. Village of Antioch, Ill.](#), 684 F.2d 446 (7th Cir. 1982).

N.Y.—[Wegman's Food Markets, Inc. v. State](#), 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980).

Cal.—[In re J. T.](#), 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1st Dist. 1974).

Md.—[Walker v. State](#), 432 Md. 587, 69 A.3d 1066, 295 Ed. Law Rep. 190 (2013).

N.Y.—[Wegman's Food Markets, Inc. v. State](#), 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980).

Vast majority of statute's intended applications

Uncertainty at a statute's margins will not warrant a facial due process void for vagueness invalidation if it is clear what the statute proscribes in the vast majority of its intended applications.

U.S.—[Pickup v. Brown](#), 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2881, 189 L. Ed. 2d 833 (2014) and cert. denied, 134 S. Ct. 2871, 189 L. Ed. 2d 833 (2014).

Cal.—[In re J. T.](#), 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1st Dist. 1974).

Construction in light of purpose

(1) When the court is concerned with neither the definition of a crime nor First Amendment freedoms, greater leeway is allowed and the statute is to be construed in light of its purpose.

U.S.—[Hamm v. Yeatts](#), 479 F. Supp. 267 (W.D. Va. 1979).

(2) Facial vagueness of a nonpenal statute sufficient to violate due process only results when no reasonable interpretation consistent with the purpose of the statute can be advanced.

U.S.—[Insurers' Action Council, Inc. v. Heaton](#), 423 F. Supp. 921 (D. Minn. 1976).

Cal.—[In re Marriage of Walton](#), 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (4th Dist. 1972).

Reason for rule

Statutes ordinarily bespeak their own intention, and, where their meaning is obscure, the state court may determine for itself what sources of extra statutory enlightenment it will consult.

U.S.—[Chase Securities Corp. v. Donaldson](#), 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945).

Ga.—[Bell v. Barrett](#), 241 Ga. 103, 243 S.E.2d 40 (1978).

Ambiguous language

A statutory word or phrase is not unconstitutionally vague merely because of some ambiguity; ambiguous language may be defined and limited by the courts so as to survive a due process challenge.

Mo.—[State v. Schleiermacher](#), 924 S.W.2d 269 (Mo. 1996).

Alaska—[State v. Marathon Oil Co.](#), 528 P.2d 293 (Alaska 1974).

16C C.J.S. Constitutional Law § 1881

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XIX. Due Process of Law

E. Nature and Scope of Guaranty

4. Exercise of Legislative Power

§ 1881. Overbreadth

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3906

The doctrine of constitutional overbreadth applies to statutes that sweep unnecessarily broadly.

The doctrine of constitutional overbreadth, which is grounded in the right to substantive due process,¹ applies to statutes or regulations that sweep unnecessarily broadly² and thereby substantially impinge on constitutionally protected conduct as well as conduct subject to governmental regulation.³ Accordingly, a law is overbroad when its language, given its normal meaning, is so sweeping that sanctions may be applied to conduct which the State is not permitted to regulate,⁴ and, although the ultimate purpose of an enactment may be acceptable and even laudatory, it will not be saved from a finding of unconstitutionality if it is otherwise facially overbroad.⁵

A law that does not reach constitutionally protected conduct, and which therefore satisfies the overbreadth test, may nevertheless be challenged on its face as unduly vague, in violation of due process.⁶

Footnotes

- 1 Idaho—[Formaro v. Polk County](#), 773 N.W.2d 834 (Iowa 2009).
Wis.—[State v. Chvala](#), 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880 (Ct. App. 2004), decision aff'd, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (2005).
- 2 D.C.—[U. S. v. Edwards](#), 430 A.2d 1321 (D.C. 1981).
Md.—[Todd v. State](#), 161 Md. App. 332, 868 A.2d 944 (2005).
Adequate notice; clear and precise enactment
(1) The fact that an enactment provides adequate notice of the acts it prohibits does not absolve it of the vice of overbreadth.
U.S.—[Sawyer v. Sandstrom](#), 615 F.2d 311 (5th Cir. 1980).
(2) A clear and precise enactment of the legislature may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct.
N.D.—[State v. Carpenter](#), 301 N.W.2d 106, 16 A.L.R.4th 622 (N.D. 1980).
- 3 D.C.—[U. S. v. Edwards](#), 430 A.2d 1321 (D.C. 1981).
Wash.—[Stastny v. Board of Trustees of Central Washington University](#), 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).
Substantial chilling of First Amendment rights
Iowa—[Formaro v. Polk County](#), 773 N.W.2d 834 (Iowa 2009).
Limiting rights by indirection
The overbreadth doctrine has the effect of preventing the limiting, by indirection, of constitutional rights.
Wis.—[State v. Chvala](#), 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880 (Ct. App. 2004), decision aff'd, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747 (2005).
Issue under concept
The issue under the concept of overbreadth is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution.
Cal.—[Castro v. Superior Court](#), 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (2d Dist. 1970).
Vindication of important interests
Statutes which prohibit constitutionally protected conduct are said to be overbroad, and their enforcement may constitute a denial of due process; nonetheless, a statute that has some restrictive effect upon protected activities may be valid if it vindicates important interests of society.
Cal.—[Bowland v. Municipal Court](#), 18 Cal. 3d 479, 134 Cal. Rptr. 630, 556 P.2d 1081 (1976).
- 4 **Own conduct**
In order to assert a claim of unconstitutional overbreadth, it is not necessary that the defendant's own conduct be constitutionally protected.
Wis.—[City of Milwaukee v. Wilson](#), 96 Wis. 2d 11, 291 N.W.2d 452 (1980).
- 5 U.S.—[Sawyer v. Sandstrom](#), 615 F.2d 311 (5th Cir. 1980).
- 6 Idaho—[Alcohol Beverage Control v. Boyd](#), 148 Idaho 944, 231 P.3d 1041 (2010).
Vagueness, see § 1880.

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 1882. Classification; discrimination

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The guaranty of due process does not prohibit classification for the purpose of legislation. The degree of scrutiny applied to a legislative classification depends on whether there is a fundamental right or a suspect classification involved.

Generally, legislative classifications do not per se violate due process principles,¹ and are not forbidden, precluded, or prohibited by the due process guaranty,² at least when such classifications are reasonable.³ Accordingly, not all classifications for purposes of legislation are invalid,⁴ but the Due Process Clause does bar patently arbitrary classifications utterly lacking in rational justification.⁵

For due process purposes, only a minimum rationality must be shown between a governmental objective and a legislative classification where there is no fundamental right or suspect classification involved,⁶ and in such case, a challenged statute must be reviewed for substantive due process purposes under the rational basis standard or test.⁷ Under such standard or test, a legislative classification is upheld if it bears a rational relationship to a legitimate governmental end, interest, goal, objective, or purpose⁸ as where it furthers a proper governmental purpose⁹ and is rationally related to such purpose¹⁰ or is

otherwise reasonable in relation to its subject matter¹¹ and adopted in the community interest.¹² Generally, a statute violates the constitutional guarantee of due process under the rational basis test if it does not bear a rational relationship to a legitimate legislative purpose or is arbitrary or discriminatory.¹³

On the other hand, if there is a fundamental right or a suspect classification at issue, the challenged classification must be strictly scrutinized.¹⁴ In such circumstance, the governmental interest must be compelling,¹⁵ and the legislative enactment must be narrowly drawn to express only the legitimate governmental interests at stake.¹⁶

Equal protection; discrimination.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.¹⁷ Although the Fifth Amendment contains no Equal Protection Clause, it does forbid discrimination that is so unjustifiable as to be violative of due process.¹⁸ Thus, statutory classifications or discriminatory legislation may be so arbitrary, injurious, or unjustifiable as to be violative of the Due Process Clause of the Fifth Amendment.¹⁹ Such discrimination is sometimes referred to as "invidious."²⁰ Ordinarily, a classification invalid under the Equal Protection Clause of the Fourteenth Amendment is also inconsistent with the due process requirement of the Fifth Amendment,²¹ and conversely, a classification that satisfies an equal protection analysis is perforce consistent with the due process requirement of the Fifth Amendment.²² Furthermore, if a law is applied and administered by a public authority so as to make an unjust discrimination between persons in similar circumstances, material to their rights, such denial of equal justice is within the prohibition of the due process clauses of the federal and state constitutions.²³

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Footnotes

- 1 U.S.—[Moritz v. C. I. R.](#), 469 F.2d 466 (10th Cir. 1972).
Activities affected differently
A law which affects the activities of some groups differently from the way it affects the activities of others is not necessarily banned by the Fourteenth Amendment.
N.Y.—[People v. Sprague](#), 69 Misc. 2d 663, 330 N.Y.S.2d 421 (County Ct. 1972).
Greater economic loss
The fact that certain members of a class subject to a regulation may suffer a greater economic loss than others does not render such regulation violative of due process if it is fair and equitable to the class as a whole.
U.S.—[Rasulis v. Weinberger](#), 502 F.2d 1006 (7th Cir. 1974).
Occupations
Classification according to occupations are reasonable and proper and not violative of due process.
Mo.—[State ex rel. Dreer v. Public School Retirement System of City of St. Louis](#), 519 S.W.2d 290 (Mo. 1975).
- 2 U.S.—[Young v. U. S. Parole Com'n](#), 682 F.2d 1105 (5th Cir. 1982).
No absolute ban
U.S.—[State of Fla. v. Mathews](#), 526 F.2d 319 (5th Cir. 1976).
Factors considered
Whether a given classification in a statute is consistent with due process depends upon the context in which the classification is made; history is relevant to such inquiry.
U.S.—[Kills Crow v. U.S.](#), 451 F.2d 323 (8th Cir. 1971).
Inequality in result
Some inequality in the result is not enough to vitiate, on due process grounds, a legislative classification grounded in reason.
Fla.—[Lasky v. State Farm Ins. Co.](#), 296 So. 2d 9 (Fla. 1974).

- 3 Ariz.—*Farmer v. Killingsworth*, 102 Ariz. 44, 424 P.2d 172 (1967).
 Cal.—*Thompson v. Board of Directors of Turlock Irr. Dist.*, 247 Cal. App. 2d 587, 55 Cal. Rptr. 689 (5th Dist. 1967).
 4 N.J.—*Accident Index Bureau, Inc. v. Male*, 95 N.J. Super. 39, 229 A.2d 812 (App. Div. 1967), judgment aff'd, 51 N.J. 107, 237 A.2d 880 (1968).

Focus of analysis

(1) The focus of a substantive due process analysis is not whether the State has treated similarly situated classes differently but whether its interest in burdening a single class outweighs the due process interest of that class.

U.S.—*Dieffenbach v. Attorney General of Vermont*, 604 F.2d 187 (2d Cir. 1979).

(2) A substantive due process analysis focuses on the interrelationship between the challenged governmental classification, the governmental interest sought to be advanced, and the constitutional interest affected by the classification.

U.S.—*Mays v. Scranton City Police Dept.*, 503 F. Supp. 1255 (M.D. Pa. 1980).

- 5 U.S.—*Price v. Block*, 535 F. Supp. 1239 (E.D. N.C. 1982), aff'd, 685 F.2d 431 (4th Cir. 1982).

Del.—*Forehand v. State*, 997 A.2d 673 (Del. 2010).

Me.—*Loi Van Ngo v. State*, 2008 ME 71, 946 A.2d 424 (Me. 2008).

Allowance of exceptions

The mere failure of a governmental regulation to contemplate and allow all possible reasonable "exceptions" to its application is not enough to make it irrational in a constitutional sense so long as it does not manifest an arbitrary classification lacking in rational justification.

Colo.—*Chiappe v. State Personnel Bd.*, 622 P.2d 527 (Colo. 1981).

Lack of means to avoid burden

When the only justification for a classification is to punish or deter conduct, the burden cannot fairly be imposed on individuals who have no means of avoiding it.

Mass.—*Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982).

- 6 Ala.—*Employees' Retirement System of Alabama v. Oden*, 369 So. 2d 4 (Ala. 1979).

- 7 U.S.—*Holman v. Hilton*, 542 F. Supp. 913 (D.N.J. 1982), order aff'd, 712 F.2d 854 (3d Cir. 1983).

Del.—*Lacy v. Green*, 428 A.2d 1171 (Del. Super. Ct. 1981).

- 8 U.S.—*DiPippa v. U.S.*, 687 F.2d 14 (3d Cir. 1982).

Ohio—*Holloway v. Brown*, 62 Ohio St. 2d 65, 16 Ohio Op. 3d 47, 403 N.E.2d 191, 15 A.L.R.4th 1153 (1980).

Legitimate goals

If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of such goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

U.S.—*Richardson v. Belcher*, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

Proper test

The test is not whether the statute, as applied to the individual plaintiff relates to a legitimate governmental interest, but whether the classification created by the statute which encompasses the plaintiff is so related.

U.S.—*Peed v. Cleland*, 516 F. Supp. 469 (D. Md. 1981).

Presumption

If a state legislative enactment classifies commercial enterprises for purposes of regulation and that classification is neither premised on suspect criteria nor infringes upon a "fundamental right," a presumption of constitutionality attaches and the statute will be set aside as violative of due process only if it is arbitrary and without foundation in public policy, its means are unrelated to its objectives, or the distinction drawn therein is invidious and lacks a rational basis incapable of justification under any conceivable set of facts.

Iowa—*Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17 (Iowa 1977).

Wide latitude

A court has wide latitude in which to find a rational relationship or to postulate a rationale for challenged legislation even in the absence of a supportive legislative history or congressional findings.

U.S.—*Globe Fur Dyeing Corp. v. U.S.*, 467 F. Supp. 177 (D.D.C. 1978), aff'd, 612 F.2d 586 (D.C. Cir. 1980).

Any state or set of facts

A statutory discrimination will not be set aside as violative of due process if any state of facts reasonably may be conceived to justify it.

N.J.—*Snedeker v. Board of Review, Division of Employment Sec., Dept. of Labor and Industry*, 139 N.J. Super. 394, 354 A.2d 331 (App. Div. 1976).

U.S.—*Issarescu v. Cleland*, 465 F. Supp. 657 (D.R.I. 1979).

Ala.—*Gideon v. Alabama State Ethics Commission*, 379 So. 2d 570 (Ala. 1980).

Ala.—*Gideon v. Alabama State Ethics Commission*, 379 So. 2d 570 (Ala. 1980).

W. Va.—*Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008).

U.S.—*U.S. v. 14 Cases More or Less, "Naremcro Medi-Matic Free Choice Poultry Formula"*, 374 F. Supp. 922 (W.D. Mo. 1974).

Fair and substantial relation to the object of the legislation

Md.—*Frey v. Comptroller of Treasury*, 422 Md. 111, 29 A.3d 475 (2011).

Determination of reasonableness

Where a statutory classification is challenged as violative of the Fifth Amendment's Due Process Clause, an examination of the factors used in determining whether the classification is reasonable is to be made in light of the extremely wide discretion given to Congress as well as the principle that equal protection does not require that all evils of the same genus be eradicated or none at all, and such examination cannot often be made on the basis of pleadings alone.

U.S.—*Local Union No. 300, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. McCulloch*, 428 F.2d 396 (5th Cir. 1970).

Persuasive evidence required

Where a statute does not discriminate on racial grounds or against a suspect class, Congress' judgment will not be overturned in the absence of persuasive evidence that it had no reasonable basis for drawing the lines it did.

U.S.—*Clayborne v. Califano*, 603 F.2d 372 (2d Cir. 1979).

U.S.—*U.S. v. 14 Cases More or Less, "Naremcro Medi-Matic Free Choice Poultry Formula"*, 374 F. Supp. 922 (W.D. Mo. 1974).

Ill.—*People v. Boeckmann*, 238 Ill. 2d 1, 342 Ill. Dec. 537, 932 N.E.2d 998 (2010).

U.S.—*Burns v. Nimmo*, 545 F. Supp. 544 (N.D. Iowa 1982).

Del.—*Lacy v. Green*, 428 A.2d 1171 (Del. Super. Ct. 1981).

Mass.—*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006).

Age

A restriction on individual rights on the basis of age need not pass the "strict scrutiny" test; age is not a suspect classification.

Fla.—*White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979).

Racial classifications

Under either the Fifth or Fourteenth Amendment, racial classifications are constitutionally suspect and must be subjected to the most rigid scrutiny.

U.S.—*Constructors Ass'n of Western Pennsylvania v. Kreps*, 441 F. Supp. 936 (W.D. Pa. 1977), judgment aff'd, 573 F.2d 811 (3d Cir. 1978).

U.S.—*Mays v. Scranton City Police Dept.*, 503 F. Supp. 1255 (M.D. Pa. 1980).

N.Y.—*People v. Lewis*, 113 Misc. 2d 1091, 450 N.Y.S.2d 977 (County Ct. 1982) (rejected on other grounds by, *People v. Kepple*, 98 A.D.2d 783, 469 N.Y.S.2d 801 (2d Dep't 1983)).

U.S.—*Mays v. Scranton City Police Dept.*, 503 F. Supp. 1255 (M.D. Pa. 1980).

U.S.—*U.S. v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

Wyo.—*Pirie v. Kamps*, 68 Wyo. 83, 229 P.2d 927, 26 A.L.R.2d 647 (1951).

Uniform treatment as one of basic elements of due process

U.S.—*Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975).

U.S.—*Johnson v. Robison*, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Schneider v. Rusk*, 377 U.S. 163, 84 S. Ct. 1187, 12 L. Ed. 2d 218 (1964).

Pa.—*Klesh v. Com., Dept. of Public Welfare*, 55 Pa. Commw. 587, 423 A.2d 1348 (1980).

Arbitrary discrimination between persons in similar circumstances

U.S.—*Wallace v. Currin*, 95 F.2d 856 (C.C.A. 4th Cir. 1938), decree aff'd by, 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939).

Racially disproportionate impact

(1) A racially disproportionate impact will not offend the due process clauses.

U.S.—[Pinckney v. Northampton County](#), 512 F. Supp. 989 (E.D. Pa. 1981), *aff'd*, 681 F.2d 808 (3d Cir. 1982).

(2) Although the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose.

U.S.—[Washington v. Davis](#), 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

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U.S.—[Bolling v. Sharpe](#), 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), opinion supplemented on other grounds, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).

Racial equality and discrimination

(1) The Fifth Amendment's Due Process Clause contains an equal protection component that prohibits the United States from invidiously discriminating between individuals or groups.

U.S.—[Atwell v. Merit Systems Protection Bd.](#), 670 F.2d 272 (D.C. Cir. 1981).

(2) The Due Process Clause of the Fifth Amendment incorporates the constitutional guaranty of racial equality.

U.S.—[Young v. Pierce](#), 544 F. Supp. 1010 (E.D. Tex. 1982).

(3) The Fifth Amendment Due Process Clause contains an equal protection element applicable to racial discrimination to the same extent as the equal protection provisions of the Fourteenth Amendment.

U.S.—[Ohio Contractors Ass'n v. Economic Development Administration](#), 452 F. Supp. 1013 (S.D. Ohio 1977), judgment *aff'd*, 580 F.2d 213 (6th Cir. 1978).

Not every discrimination

Not every discrimination rises to the equivalent of a denial of due process under the Fifth Amendment.

U.S.—[U.S. v. Ah Yun](#), 371 F. Supp. 668 (D. Haw. 1974).

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U.S.—[Richardson v. Belcher](#), 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

Ind.—[Allen v. Pavach](#), 263 Ind. 574, 335 N.E.2d 219 (1975).

Meaning of term

The term "invidious" in the context of a claim that a difference in treatment amounts to "invidious" discrimination in violation of the Fourteenth Amendment means arbitrary, irrational, and not reasonably related to a legitimate purpose.

Del.—[Eaton v. State](#), 363 A.2d 440 (Del. 1976).

Federal and state constitutions

Invidious discrimination runs afoul of the Due Process Clauses of both the federal and state constitutions.

N.Y.—[Phelan v. City of Buffalo](#), 54 A.D.2d 262, 388 N.Y.S.2d 469 (4th Dep't 1976).

21

U.S.—[Johnson v. Robison](#), 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974).

22

U.S.—[Fisher v. Secretary of U. S. Dept. of Health, Ed., and Welfare](#), 522 F.2d 493 (7th Cir. 1975).

Minn.—[Shreve v. Department of Economic Sec.](#), 283 N.W.2d 506 (Minn. 1979).

Underinclusion

U.S.—[Bussey v. Harris](#), 611 F.2d 1001 (5th Cir. 1980).

23

N.D.—[Application of Theel Bros. Rapid Transit Co.](#), 72 N.D. 280, 6 N.W.2d 560 (1942).